WAKE FOREST UNIVERSITY
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The Wake Forest Jurist is published twice yearly by the Wake Forest University School of Law. Its main purpose is to inform the friends and alumni of the Law School about activities and events of interest in the Law School, of recent important decisions by the courts of North Carolina and other jurisdictions, and news of the achievements and activities of fellow alumni. In this way the Jurist seeks to provide a service and a meaningful link between the School of Law and its alumni. Also, the magazine provides a forum for the creative talents of students, faculty and its alumni and an opportunity for legal writing by them. Opinions expressed and positions advocated herein are those of the authors and do not represent official policy of the School of Law.

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ENVIRONMENTAL

(photos by Gardner)

ECONOMY

Dean's Column

"Dean, what is this Professional Center I hear so much about?" "Are you becoming a business law school?" These are some recurring questions that I have been asked by alumni and supporters in the last several months. I thought I would use this dean's column to set the record straight as to what the Professional Center concept is and is not.

As a beginning, the answer to the last question is "no." Wake Forest is not going to become a law school only for those interested in business or corporate law.

The original impetus for the Professional Center building to house the Wake Forest School of Law and the Babcock Graduate School of Management was the space needs of both schools. For instance, our current building has inadequate space for library, classrooms and student and other activities. Our facilities are not in keeping with our development as a law school of the first rank. The new building will effectively double our law school space without any increase in the student body. The total space in the building will be 170,000 square feet, built in the form of an upside down and squared off "U" with a foot on each leg of the "U". Each of the schools will have its own distinctive wings and entrances, preserving their separate identities. These wings will be joined in the center by a library wing which also will contain shared space around a common courtyard. The building will sit on Wake Forest Drive close to the University Parkway entrance. It has been designed by Cesar Pelli and Associates of New Haven, Connecticut.

Robert K. Walsh

By sharing certain areas, both schools will receive more space than would be economically feasible in totally separate buildings.

By sharing certain areas, both schools will receive more space than would be economically feasible in totally separate buildings. For instance, in the shared wing, there will be a placement interviewing suite with eight interviewing rooms. This should work out well, since the heavy interviewing season for law students is in the fall semester, while the graduate school of management has its prime placement season in the spring. There will also be a few shared classrooms and seminar rooms, but, again, the heaviest schedule of classes of the respective programs differ enough to make having a few shared classrooms feasible.

A highlight of the shared space in the new building will be the lounges. There will be two student lounges, but they will not be divided by school. One will be an informal vending machine lounge with vinyl floor. The other will be a carpeted, quiet, easy-chair study lounge. There will be one faculty lounge for the faculty of both schools, with a law and a management conference room respectively at each end of the faculty lounge through French doors. It is envisioned that a good deal of informal cross-disciplinary discussions will go on in these lounges.

While in my first year as dean I have become a great advocate of the concept of the Professional Center, I want to emphasize that we are not merging or integrating the management and law schools. In my travels, I have heard the comment that students with interests in areas of practice other than business would not find our school and its curriculum as beneficial as in the past. This is absolutely not true. Please help me to dispel any such misconception by telling potential students and employers that we will continue to focus on educating practicing lawyers for the various areas of the practice. Our programs in litigation, public law and other areas will continue to be strong and grow. We will continue to devote a large portion of our faculty resources to the foundational first year of law school. We will continue to have four sections of forty in the traditional first year courses with

sections of approximately half that size for legal research and writing. The building will have two trial courtrooms with modern built-in videotaping equipment to continue our successful curricular and extracurricular offerings in advocacy.

On the other hand, we will not waste the opportunity presented by the concept of the Professional Center. We already have a joint JD/MBA program which allows a student to combine a three-year law curriculum and the two-year MBA curriculum into a shorter combined course of study. Approximately five percent of our current law students are in this joint program, and we anticipate that it will grow in the new Professional Center. More importantly, however, while Wake Forest School of Law has graduated many outstanding lawyers practicing in the business and corporate area, we believe that we can strengthen our program in the future for those that want to practice in these areas.

A good lawyer understands thoroughly the "facts" of each case or transaction in order to properly apply legal principles. The good business or corporate lawyer needs an appreciation of the context of management decisions. The law school has upper class electives in business planning, business drafting, securities regulation, banking law, corporate finance, insurance, real estate finance and taxation. While such courses will not in the main be team-taught throughout the course, having a member of the management school faculty for particular classes should lead law students to a better understanding of the facts and realities underlying business decisions.

Wake Forest School of Law has graduated many outstanding lawyers practicing in the business and corporate area and we believe that we can strengthen our program in the future for those who want to practice in these areas.

Dean John McKinnon of the Babcock Graduate School of Management began as a new dean at Wake Forest with me. John appreciates lawyers. He has two older brothers who are lawyers. One has been a North Carolina Superior Court Judge and the other has risen through the legal department of a corporation to head it. Dean McKinnon rose in the corporate world to become president of Sara Lee Corporation. He believes that lawyers interject public interest issues into business discussions. He preferred that lawyers who worked with him be part of the decision-making process from the outset. Moreover, Dean McKinnon has indicated that his school has courses in its curriculum which could be improved if a law faculty member could raise and discuss legal and public issues that are important to management decisions. Dean McKinnon says that in the current corporate world, business executives and lawyers work together, sometimes without a good understanding of the other's profession. We would hope to foster a better understanding between the two professions in the new building.

During orientation, I tell our beginning students that if all we do in three years is to make them the most technically competent lawyers possible, we have failed. We care about instilling in our students a sense of what it means to be a responsible professional. This places a high emphasis on faculty as role models and the discussion of ethical issues stressing values and the public good. I have heard Dean McKinnon emphasize the importance of ethical discussions in his programs as well. This focus on ethics, values and professionalism should be fostered, not diminished, by the programs in the new Professional Center.

Having a member of the management school faculty teach particular classes should lead law students to a better understanding of the facts and realities underlying business decisions.

The schedule for the new building calls for breaking ground in August with completion in time for the opening of school for the fall semester of 1992. Dean McKinnon and I have set up a joint faculty committee to discuss future cooperative programs in the Professional Center building. The law faculty members on this committee are Professors Miles Foy, Alan Palmiter, Ralph Peeples and David Shores. This joint committee is scheduled to report back this September. After some preliminary faculty discussion, we intend to have these reports be the focus of next October's Board of Visitors meetings for the two schools. We then hope to get input from persons in the national corporate and legal communities, who have no previous affiliation or interest in Wake Forest, but might become interested in this unique facility and concept. We want the development of the Professional Center to be a thoughtful one, building on the strengths and heritage of Wake Forest. If you have any thoughts on this collaborative program, please write me.

Editor's Page

As we enter a new decade we see our environment changing before our eyes — from increasing hazardous wastes to the dwindling Amazon rain forest. As a result, we see the world's attitude toward the environment change. Because of this, environmental law is becoming the fastest growing area of practice in years.

This issue of the *Jurist* explores the changing environment and looks at how the law school and lawyers are keeping up.

The law school currently offers three courses dealing with the environment: Environmental Law, Natural Resources and Land Use. In addition, the school's chapter of the Environmental Law Society (ELS) was revived last year because of the students' increased interest in the environment. In just two years ELS has become one of the most visible groups at the law school. It's members are involved in a number of projects, from sponsoring a recycling drive to cleaning up a portion of a Winston-Salem roadway four times a year in the nationwide Adopt-A-Highway program.

Not only is the law school exposing students to environmental concerns, but state bar associations and continuing legal education programs throughout the country are keeping attorneys abreast of the changes in the laws affecting the environment. In addition, many law firms are creating environmental law departments to meet the demand of their existing clients and to attract new clients who are unable to find answers to their environmental law questions elsewhere.

Lawyers aren't the only ones adapting to our changing environment. The world's celebration of the 20th anniversary of Earth Day on April 22, 1990, not only showed that people are aware of what is happening to our universe, but it also showed that people are concerned and ready to help the environment by changing the way we live.

Even those of us who do not practice environmental law can have an impact on our changing world either by making simple changes in our daily lives or by becoming involved in community activities developed to clean up the environment. So, whether we specialize in environmental law or not, we all can help make this planet a little better place to live.

Donna Colberg
Editor-in-Chief

This landfill is predicted to be full by 1996. (photo by Gardner)

Environmental Law at Wake Forest

Students interested in environmental law have several opinions for involvement at Wake Forest University School of Law. They can join the Environmental Law Society (ELS), and they can take several classes which are offered each year: Environmental Law, Natural Resources and Land Use Regulation and Planning.

ELS, after being defunct for two years, was brought to life again in Spring, 1989, by Allyn Turner and three other students. ELS currently has about 35 members. The main purposes of ELS are to promote awareness of environmental issues among law students and to sponsor activities which promote the improvement and appreciation of the environment.

This year, ELS has become one of the most visible groups at the law school. While not ignoring the serious consequences of environmental problems, ELS stresses the positive impact individuals can have on the environment.

ELS brought two speakers to campus this past fall. In addition, ELS members staffed information tables in the law school lounge one week in the early spring. The week culminated in the very well attended "Get Polluted" party at a local bar. Next year, ELS hopes to publish a monthly newsletter for law students to further heighten awareness. ELS makes suggestions to the law school for curriculum additions, and it has provided the director of the law library with a list of suggested publications related to environmental law.

ELS's goals of fostering appreciation of the environment was realized when ELS members took an excursion to Pilot Mountain. ELS Activities Coordinator Leila Rassekh commented that the beautiful panoramic view from Hanging Rock helped to confirm the importance of preserving the environment. Leila is planning another climbing expedition this spring and a rafting trip next fall.

In addition, ELS is planning a week of activities in celebration of the twentieth anniversary of Earth Day, the day that marked the beginning of the national environmental movement. ELS hopes to bring in several speakers, set up an information booth, and participate in the "Pledge Green" campaign, in which people pledge to work towards a better environment by, for example, promising to use less gasoline for the next year or to turn off lights when leaving a room.

The Wake Forest ELS Chapter sent two representatives to the national conference of Environmental Law societies in New Orleans. Many environmental law societies write briefs in support of environmental causes, an activity which may be done in the future by the Wake Forest chapter.

ELS is involved in several other activities in the community. Since February, ELS has been collecting aluminum cans to recycle. ELS is participating in the Adopt-A-Highway program which is part of "Keep Winston-Salem Beautiful." ELS has made a two-year commitment to clean a 2-mile stretch of road four times a year. ELS will be provided with bags and safety vests, and the local highway department picks up the collected garbage from the site. Adopt-A-Highway has widespread community support.

The Environmental Law class has been taught during the spring semester for the past six years by Mr. James S. Dockery of the Winston-Salem law firm, Petree, Stockton and Robinson. Environmental Law is a two credit hour survey course with a limit of 18 students because class discussion is encouraged. This year, there was a dramatic increase in the number of students who wanted to register for Environmental Law, however, all of the third year students who wanted to take the class were able to do so. Students are required to write a paper and to present it to the class, and there is also an examination at the semester's end.

Environmental Law includes the following coverage: the roots of environmental issues, economic matters, a regulatory system as opposed to market handling of environmental issues, common law remedies, how the government should address environmental issues in its decisions and an examination of basic environmental regulatory schemes using the Clean Air Act as a paradigm. Other regulations discussed concern pesticides, the introduction of toxic substances into the marketplace and control of toxic waste.

Dockery is the former chairperson of the Forsyth County Air Pollution Control Authority. Each semester Dockery brings the students in his class to the authority where they meet with air quality regulators. Occassionally, guest speakers from the community are invited to class.

Dockery's professional practice includes the representation of both corporations seeking advice on environmental

ELS Members help clean up a local roadway. (photo by Gardner)

compliance and environmental activist groups.

Professor Thomas E. Roberts teaches Natural Resources, a two credit hour course, and Land Use Regulation and Planning, a three credit hour course.

Natural Resources is a relatively new course at Wake Forest, having been added to the curriculum two years ago. The ownership, development and use of natural resources is studied. In addition, the constant conflict between development and conservation interests is explored.

One natural resources issue gaining increasing national attention is the transfer of water from one geographic location to another. Areas with abundant water supplies are reluctant to share their water because of the negative impact on wildlife. Furthermore, when the amount of water decreases, there is less water to dillute pollutants.

Law students collect cans to recycle. (photo by Gardner)

Land Use is a topic closely related to Natural Resources. This course discusses matters such as effective zoning laws to control growth and to preserve agricultural land and the water supply. Developers are faced with increased regulation in gaining permission to use land. Students in the Land Use class have the option of writing a paper or taking a final examination.

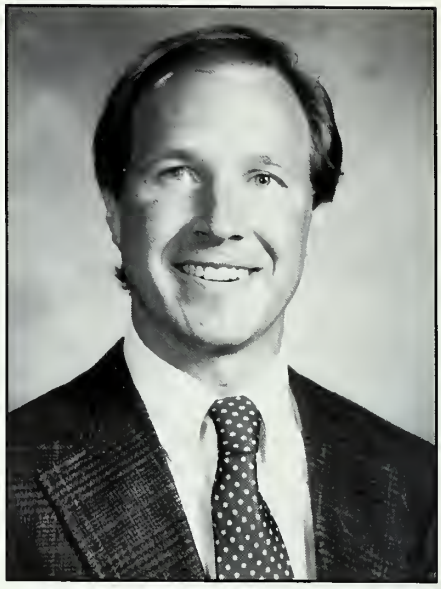
By Mary F. Balthasar, a first-year student.

An Advocate for the Environment

Pursuing a life-long interest in Environmental Law is just part of a typical day's work for Wake Forest Law Graduate Walter F. Clark. For the past five years, Clark has served as the Ocean and Coastal Law Specialist for the University of North Carolina Sea Grant College Program. According to Clark, Sea Grant is a "federal and state partnership that promotes the wise use of coastal resources through research, education and extension." Sea Grant, a department located in the state university system in most coastal states, consists of experts in law, economics, coastal engineering, marine biology and fisheries. The UNC Sea Grant office is located at North Carolina State University in Raleigh.

Clark, a Mt. Airy native, attributes his concern for the environment to his early years spent as a Boy Scout and to the good stewardship principles taught by his parents. A graduate of East Carolina University, where he studied history and political science, Clark entered law school at Wake Forest with the intent to practice environmental law. At Wake Forest he studied Land Use and Environmental Law in pursuit of his interest. After receiving his Juris Doctor degree in 1979, Clark attained a Masters in Regional Planning with an emphasis in environmental planning from the University of North Carolina at Chapel Hill.

As a staff attorney for two years with the State Division of Coastal Management, Clark began focusing on coastal issues. In that capacity, he represented the state in administrative appeal hearings regarding coastal development permits. According to Clark, this position gave him the opportunity to be a true advocate for environmentally sound coastal development. The Division of Coastal Management administers one of the state's most stringent environmental laws: the Coastal Area Management Act.



Walter F. Clark

In his current position at Sea Grant, Clark uses legal research to look for new strategies to better manage coastal and ocean resources. Clark also enjoys sharing his knowledge of coastal law with the general public through workshops and publications. He is the editor of a newsletter titled *Legal Tides* which covers current events in North Carolina coastal law, and he is the author of numerous papers and articles concerning coastal issues. Clark also teaches a course at North Carolina State University titled Oceans and occasionally teaches portions of undergraduate and graduate courses at other local universities.

When asked to name an important future concern for environmentalists, Clark mentioned international environmental law. Clark noted that since air and water do not recognize jurisdictional boundaries and since many of our environmental problems have become global in scale, effective international environmental agreements are imperative. To do his part to address this concern, Clark hopes to do international consulting with the Sultanate of Oman next year to help that country develop a coastal management plan.

By Sara Beth Fulford, a second-year student from Farmville, NC.

NCBA Meets Environmental Concerns

Environmental Law: the hottest topic around. And everyone, including the North Carolina Bar Association, is rushing to keep up with the need for new updated education. Environmental law as a specialty was born only about twenty years ago. One reason for the sudden need of environmental specialists: Super Fund. Super Fund, which created a fund to clean up waste sites and to force corporations responsible for pollution to pay the bill, was unbelievably complex.

"Super Fund took years to crank up and in 1986 it had to be reauthorized and amendments were passed that gave the law sharper teeth." *The National Law Journal*, Rorie Sherman (May 22, 1989, p. 25, 26). In 1986 there were 154 Super Fund lawyers with the EPA. In 1989 there were 231.

After the federal Superfund law was passed, many state legislatures were inspired to pass similar laws to identify hazardous waste sites and to force companies to pay the bill. Many other federal and state laws soon appeared on the scene and sent attorneys in our state scrambling for help. Many have turned to the North Carolina Bar Association.

The Environmental Natural Resources Section of the North Carolina Bar Association now has around 300 members. The section offers two yearly seminars which focus on current environmental issues. The seminars have received an unbelievable response. The spring seminar is usually geared to the more advanced issues such as issues for attorneys currently practicing environmental law. The April 27-28, 1990, seminar was held at Atlantic Beach and topics covered dealt with water rights, coastal environmental concerns and other related subjects.

The second seminar offered by the Environmental & Natural Resources section is offered in the fall and is intended for more basic learning. The fall seminars vary from year to year. According to Stephen Earp, on odd years the seminar recaps what the legislature has done. "Environmental law is still in its infancy. It is still changing," Earp says. The seminar gives an update on regulatory changes at both the federal and the state level. During the even years, the seminar deals with the basics of environmental law. The focus is general and aimed at the new attorney or the private practicioner. Earp believes that because environmental law is becoming so pervasive, even the private practitioner should know the basics. "They [general practitioners] ought to have environmental awareness, for their own good," Earp states. Both new and existing clients are demanding firms that can handle their environmental concerns.

Landfills — an environmental concern. (photo by Gardner)

These clients are not limited to corporate entities with liability concerns, they can also take the form of lcoal and state governments and the private individual.

Carson Carmichael, a member of the Environmental & Natural Resources Section of the NCBA agrees with Earp. Carmichael practices with Bailey & Dixon, in Raleigh, as an environmental law specialist. He says that because environmental law has increased in importance, and obviously will continue to do so, "there is a need for more general practitioners to have some knowledge of environmental law." This is especially true for the practitioner who handles real estate and business issues. Carmichael says that because "the scope of liability and law is expanding, more people need help, including existing clients." If the attorney does not know even the basics of environmental law problems may result. Earp's firm, Smith, Helms, Mulliss & Moore of Greensboro, has twelve environmental lawyers. He explained that his firm sometimes helps clients of smaller firms deal with their environmental concerns, working in conjunction with the smaller firm or sole practitioner who lacks environmental expertise.

James Conner, II, of Brooks, Pierce, McLendon, Humphrey & Leonard, of Greensboro, is another environmental law specialist. He is one of four environmental specialists at his firm. Conner's clients range from large corporations to local government to individuals. These clients may be state-based, national or international. Conner recommends the NCBA's CLE seminars for both specialists and young lawyers. Conner has taught attorney seminars on hazardous waste for CLE credit through the National Business Institutes which is not affiliated with the NCBA. Conner considers these seminars important to untangle the complex and confusing laws of the environment. "The laws, written by politicians, are often hard to understand," he says, "but now we are at a stage where we have a lot of the laws we will have for a while. What needs to be done now is fine-tuning and enforcing these laws. Major loopholes need to be filled, and more sophisticated tests need to be developed."

In addition to the Environmental & Natural Resources section of the NCBA, other sections have added environmental

issues to their seminars. The Commercial Real Estate section has offered an environmental topic for CLE, as have two Business Law seminars, covering such topics as regulations and the environmental audit. Soon there will be even more topics offered to educate attorneys on environmental issues. For example, there may be something on toxic tort litigation offered by the Litigation Department next year. Carmichael has noticed a flood of toxic tort litigation as well as brown lung and asbestos cases. "This will only continue to grow as the private sector becomes more aware of environmental responsibility and liability," he says.

In addition to the NCBA's agenda on environmental education, the private sector has picked up on the environmental concern as a hot topic. Executive Enterprises, Inc. has a long list of topics covered in its environmental courses, conferences and workshops including pesticides, clean air, environmental insurance and hazardous waste. The National Business Institute also offers seminars for CLE credit and has been extremely helpful in keeping attorneys abreast of new laws and concerns in the environmental field.

NCBA and the CLE have kept up with the recent boom in environmental law. Carmichael notes that the Bar has "definitely provided enough CLE for everyone to be informed about this hot issue, at least in a basic sense."

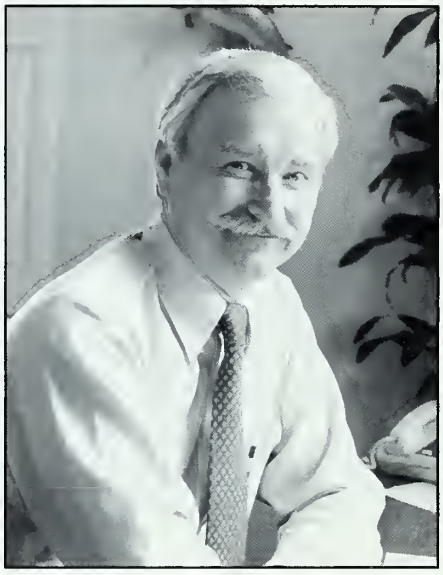
NCBA will continue to offer environmental seminars as long as there is a need for them. "We are generally meeting the needs of North Carolina attorneys," says Earp. "We may add a third seminar but there is an incredible number of private and national seminars available." He says that the main focus of the Environmental & Natural Resources section of the NCBA will concentrate on improving its quarterly publication, *Environmental News*. The publication contains information about legislative changes, administrative decisions and practical trial tips. Earp says the publication will be improved, "refined and emphasized" to better aid the environmental veteran and the new non-specialist.

Environmental law is going strong in North Carolina and the NCBA and CLE are definitely setting the pace.

By Elizabeth M. Dranttel, a second-year student from Churchton, MD.

Dockery's Dedication to the Environment

While the public is becoming increasingly aware of environmental issues, some lawyers have long been active in the protection of our endangered environment. One such lawyer is Mr. James S. Dockery, Jr., a partner at Petree Stockton & Robinson and a Lecturer in Law at Wake Forest University School of Law. He has been teaching environmental law for the school for six years.



James S. Dockery (photo by Gardner)

Dockery began practicing environmental law after becoming active in the Sierra Club, an organization for which he has served as Chairman of the North Carolina Chapter, among other roles. He also served as the chairman of the Forsyth County Air Pollution Control Authority in the mid-1970's when air pollution regulation was first being implemented.

Dockery is presently the Chairman of the Southern Environmental Law Center with offices in Charlottesville, VA, and Chapel Hill. This public interest center, with a staff of six attorneys, provides expert legal representation for environmental and citizen groups in the South. The Center engages in litigation against governmental agencies and polluters. For example, the Center has emerged as the principal legal voice in a battle for the responsible management of the Nantahala and Pisgah National Forests of North Carolina. The Center filed a legal appeal to a proposed management plan by the U. S. Forest Service to protect wildlife, wilderness, recreation and water values from excessive clear cutting and timber harvesting. The Center has other pending litigation involving protection of wetlands, pollution of streams and sounds, billboard regulations and a number of other subjects.

Asked why environmental law is important, Dockery said: "Preservation of life and the quality of life are central subjects of environmental law." He explained that "all life depends upon air and water and upon several ecosystems, the croplands, grasslands and forest ecosystems, as well as the oceans. The degradation of these upsets the balance of our environment and threatens the existence and quality of life for present and future generations. In this delicate balance, all life has value, beyond commercial value, as part of an ecosystem."

Dockery stressed the importance of the environmental lawyer's ability to make society aware of the value of all forms of life and our fragile environmental resources. "Lawyers have an important role in helping shape society's values and regulating or resolving competing interests. Lawyers having a sensitivity to the importance of environmental law can equip society to make better choices in the years ahead."

One development Dockery sees in modern environmental law is the public's increasing support for enforcement of environmental laws. This results from the awareness and fear that in many places pollution is reaching or exceeding critical levels. According to Dockery, generally the environment can tolerate a limited amount of pollution until a threshold level. Once that level is exceeded, there is a danger to health and to our ecosystems.

Dockery warns that the environmental focus in the future must be on world-wide protection. The earth is one interconnected globe, and the activities in one nation can affect the entire earth. Dockery points to the destruction of the tropical rain forest, and the use of ozone damaging chemicals as examples of threats to the environment of the entire earth.

By Jeffry I. Hrdlicka, a second-year student from Greensboro, NC.

Wake Graduate Student Holds Fundraiser to Preserve Rainforests

M.B.A. Student Bob Seawick (photo by Gardner)

A group of Quaker conscientious objectors leave Alabama in 1953. They settle far away in the Tilarian mountains of Costa Rica. A visitor to their community observes their simplistic, day-to-day lifestyle of making and selling cheese. But the group — known as the Monteverde Conservation League — works to meet a goal that reaches beyond local daily survival and, in fact, affects life around the world. The Monteverde Conservation League continually buys rainforest land and preserves it in its natural state. Presently, 25,000 acres of wildlife, vegetation and resources lie protected in the Monteverde Cloud Forest Reserve. Bob Seawick, a second year M.B.A. student, wants 200 more acres — "The Wake Forest Tract" — added to the current preserve.

Seawick dismisses any notion of conflict between his interests in business and his interests in natural conservations. Having worked in the commercial sector, Seawick saw a desperate need for businessmen and women to involve themselves in projects that work for the good of the world. The negative ideas of "cowboy capitalism" and intense competiton that Seawick observed eating at a national workforce could be undercut by such participation. Seawick's solution of involving business in the preservation of rainforest resources is one that, he believes, builds everything from interpersonal to international relations between competing businesses.

To meet his goal, Seawick staged a 90-minute multimedia presentation on Costa Rica rainforests at Brendle Recital Hall on February 28th. For a four dollar donation, Seawick involved, educated and entertained members of the Wake Forest community. Showing slides of the Costa Rican countryside, accompanied by his own full-bodied musical compositions, Seawick brought the importance of environmental conservatism in a far-away country close to home.

Stressing how rainforests affect our everyday lives, a local biologist began the event with a short message. Many aspects of nature taken for granted would not exist without the resources of rainforests, he said. For this biologist — who enjoys bird watching at the Reynolda House grounds — rainforests help enable his pastime. Without the forests, fewer and less diverse species of birds would migrate to and from the area. Though a seemingly trivial point, the biologist made it clear that all of us, even at WFU, must be concerned about the destruction of rainforest land.

Seawick began his part of the presentation by showing slides taken from his 1986 journey to Costa Rica and by playing his synthesized piece, "The Rainforest Cathedral." The images portrayed by the slides and music revealed Seawick's vision of Costa Rica's "off the beaten path" beauty. Seawick was particularly effective in reflecting the personalities of the Ticos he photographed, capturing their sincerity and sense of community.

Midway through his presentation, Seawick shifted his emphasis from the microcosmic problem of destroying resources in Costa Rica to the global, macrocosmic concern of natural conservation. While showing slides of the solar system taken by an observatory, Seawick sat down at the grand piano and played two of his compositions: "The Milky Way" and "Ancient Rivers."

This switch in emphasis appropriately addressed the worldwide effects of rainforest destruction. A December 31, 1989, article in the *Greensboro News and Record* explained that the rainforests of Central and South America act as the "air conditioner" of the planet, keeping it cool by continual photosynthesis and rain. When the forests are cut or burnt down, more carbon dioxide escapes into the atmosphere, contributing to the greenhouse effect. The ultimate result from this deforestation could be farmland turned to desert and coastal areas flooded by melting polar ice caps.

Here at home, our water supply, diverse animal species and medicinal treatments depend on the existence of rainforests. Currently, rainforest areas the size of West Virginia are cut down every day by industrial organizations, farmers and cattle ranchers. Ironically, three times the amount of resources are produced by preserving the land than by slashing and burning it.

Seawick's later musical composition, "The Train of Limone," brought the audience back to the Costa Rican countryside. The slides ranged from scenes of highland volcanoes and coffee plantations to lowland steamy jungles and wave-torn beaches. Some of the slides showed the Ticos, the people who live in and depend on the rainforest for their daily survival. They did not seem so far away.

By Aim'ee N. Richardson, a first-year student from Ft. Myers, FL.

Legal Article — Environmental Lender Liability

(photo by Gardner)

*By Allyn Turner**

I. Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") was enacted by Congress in 1980, reflecting widespread concern over our nation's rapidly increasing hazardous waste problem. CERCLA, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[1] invests authority in both federal and state governments to "respond to releases and threatened releases of hazardous substances and thereby protect the public health and environment."[2] Under CERCLA and SARA the EPA has the job of targeting hazardous waste sites for cleanup, and accordingly has the power to force responsible parties to pay for cleanup costs, related expenses and damages.[3]

Since CERCLA's enactment in 1980, a number of cases have specifically interpreted CERCLA's provisions to include banks and other financial institutions or lenders as "potentially responsible parties."[4] As a result, lenders have spent a considerable amount of time trying to avoid responsibility for hazardous waste cleanup costs pursuant to CERCLA. Liability for lenders under CERCLA means not only lost security or the possible imposition of statutory superliens, but also potentially enormous cleanup costs. Lenders must continue to evaluate their vulnerability as the case law develops so that they can minimize their liability under CERCLA and SARA. This text attempts to provide a comprehensive overview of how lender liability has been approached by the statute, how it has been addressed by the courts to date, and what changes may be expected in the near future. Finally, this text provides some general suggestions and guidelines for lenders to avoid libility under CERCLA.

II. CERCLA: Background and Analysis of Pertinent Provisions

CERCLA's enactment "was intended to supplement the Resource Conservation Recovery Act of 1976 ("RCRA") which regulates newly-created hazardous waste from "cradle to grave" but fails to regulate abandoned and inactive hazardous waste sites already in existence.[5] However, beyond generally stated policy objectives, it has been very difficult for the courts, or for potential litigants, to interpret CERCLA's provisions with any amount of certainty or precision. The version of CERCLA finally passed by Congress was an eleventh hour, hastily-enacted political compromise. As a result, CERCLA's legislative history is "sparse and generally uninformative."[6]

CERCLA was designed to "create a source of funds, commonly known as 'Superfund,' for financing prompt governmental cleanup of hazardous waste sites, and to force responsible parties to bear the cost of cleaning up the hazards they create."[7] Monies from the Superfund may be used to finance governmental response costs and to pay expressly authorized claims to other persons.[8] In turn, costs recovered under CERCLA § 107(c) by the federal government are deposited into the "Superfund."[9]

Under CERCLA's liability provisions, "the owner and operator of a vessel . . . or a facility, [or] any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for" all costs of removal, remedial action incurred by the federal government or a state government, other necessary costs of response, and damages for injuring or destroying natural resources.[10]

The only available defenses for an owner or operator, or for any potentially responsible party, are those statutory defenses described in CERCLA § 107(b).[11] This section is narrowly drafted, allowing only an act of God, an act of war, or an act or omission of an unrelated third party as an excuse that may alleviate a party's liability.

Actions against current owners or operators may take a variety of forms. First, the Environmental Protection Agency ("EPA") may initiate hazardous waste cleanup using existing Superfund monies. It may then seek reimbursement from the current owner or other responsible parties.[12] Second, CERCLA § 106(a) authorizes the government to force a current owner or other responsible party to clean up a site at its own expense where an "imminent and substantial" danger to

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[1] 42 U.S.C. §§ 9601-75 (Supp. V 1986).

[2] 42 U.S.C. § 9607(a)(4) (Supp. IV 1986); Quentel, *The Liability of Financial Institutions for Hazardous Waste Cleanup Costs Under CERCLA*, 1988 Wis. L. Rev., 139, 142 (hereinafter "Quentel").

[3] *Id.*; 42 U.S.C. § 9607(a)(4).

[4] *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988).

[5] McDavid, *Liabilities of the Innocent Current Owner of Toxic Property Under CERCLA*, 23 U. Rich. L. Rev. 403, 405 (1989) [hereinafter "McDavid"].

[6] *Chemical Waste Management, Inc. v. Armstrong World Indus., Inc.*, 669 F. Supp. 1285, 1290 N.6 (E.D. Pa. 1987); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985).

[7] McDavid at 405.

[8] *Id.* at n.13; *Exxon Corp. v. Hunt*, 475 U.S. 355, 359-360 (1986).

[9] *See*, 42 U.S.C. § 9607(e)(3).

[10] 42 U.S.C. § 9607(a) (Supp. IV 1986).

[11] *See*, 42 U.S.C. § 9607(b) (Supp. IV 1986).

[12] McDavid at 406.

[13] *Id.*; 42 U.S.C. § 9606(a).

health or environment exists "because of an actual or threatened release of a hazardous substance from a facility."[13] Third, CERCLA § 107(a)(4)(B), which provides that a responsible party shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan," allows for a private cause of action against a current owner or other responsible party by one who "has incurred costs resulting from a release or threatened release of a hazardous substance from the property."[14]

A. Liability: Scope and Apportionment

Lenders who find themselves in the unfortunate situation of being included as a potentially responsible party under CERCLA can be held strictly liable without further inquiry into their conduct.[15] "In short, the conduct of a party is not examined once it is determined that he meets the criteria of being a responsible party."[16]

The Second Circuit determined in *New York v. Shore Realty Corp.*[17] that "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [statute as enacted]." The court in *Shore Realty* relied on 42 U.S.C. § 9601(32), which provides that the standard of liability under CERCLA shall be construed as equivalent to the standard of liability under § 311 of the Clean Water Act.[18] Congress knew that courts, including the Fourth Circuit, had previously interpreted § 311 as imposing strict liability. Furthermore, the sponsors of CERCLA clearly expressed their intent that CERCLA impose strict liability.[19] However, *Shore Realty* goes on to note that since statutory defenses exist under CERCLA, the imposition of strict liability is not necessarily absolute.[20]

Courts have universally adhered to *Shore Realty's* finding that strict liability is the appropriate standard under CERCLA § 107(a).[21] However, most courts "[permit] application of common law tort principles, including joint and several liability."[22] The common law theory of joint and several liability can be expressed as follows: (1) where there are two or more defendants, liability may be joint and several; (2) where liability imposed is joint and several, each of the defendants is individually liable for the total amount owed; (3) liability for the total amount owed means that each defendant is legally responsible for paying the total amount. *United States v. Chem-Dyne Corp.*,[23] specifically addressed the issue of joint and several liability under CERCLA.[24] In *Chem-Dyne*, the court employed the "indivisible harm rule," which essentially means that when multiple defendants caused harm that is indivisible and cannot be reasonably apportioned, then those parties will be held jointly and severally liable unless they can prove that the harm was divisible.[25] When Congress passed the Superfund Amendments and Reauthorization Act of 1986 (SARA), they preserved CERCLA's fundamental liability scheme, thus tacitly approving the judicially established norm of applying joint and several liability principles to apportion liability among parties under CERCLA.[26]

In *United States v. Monsanto Co.*,[27] generators of hazardous waste sought to have liability apportioned on the basis of volume. The court rejected the argument, stating that no relationship between volume, release and harm had been shown.[28] *Monsanto* relied on both *Shore* and *Chem-Dyne* in applying joint and several liability based on indivisible harm. Furthermore, the Court noted that the burden of proof to show that liability could be apportioned reasonably was on the defendant.

Joint and several liability often has a potentially harsh impact upon lenders. Hazardous waste cleanup can be a very costly process, and "some lenders have discovered that they are the 'deep pockets' expected to clean up a site, leaving them with a liability in place of a security interest."[29] A lender which is found to be a responsible party under CERCLA may be "innocent" in that the lender had no hand in creating the environmental problem. However, "joint and several liability" means that each party is responsible for the entire cost of cleanup. A solvent or "deep pocket" party such as a lender may get stuck with the entire bill, or in any event with a disproportionately large share.

B. The Right to Contribution Under CERCLA and SARA

CERCLA, as enacted, failed to address a responsible party's right to contribution from other responsible parties. However, many courts proceeded to answer this issue by allowing a right of contribution where joint and several liability was imposed. The doctrine of contribution is an adjunct to the rule of joint and several liability, and provides that when one of several parties responsible for certain costs or damages is compelled to pay the entire amount of those costs, he may require the other responsible parties to reimburse him for their proportionate shares. For example, in *Colorado v. ASARCO, Inc.*[30] the court determined that CERCLA did not preclude allowing a right to contribution based on federal common law principles.[31] CERCLA did not address contribution until SARA was enacted in 1986. SARA essentially codifies the judicially created right to contribution described in *Colorado v. ASARCO* and other cases.[32] Under SARA, a responsible party has a right to contribution if (1) joint and several liability has been imposed, and (2) the party has shown that she has paid more than her fair share of the "common liability".[33] Contribution has the effect of lessening the

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[14]42 U.S.C. § 9607(a)(4)(B); McDavid at 406.

[15]*United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988).

[16]*Id.*

[17]759 F.2d 1032, 1042 (2d Cir. 1985).

[18]*Id.*

[19]*See*, 33 U.S.C.§ 1321; *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); 126 Cong. Rec. 30,932.

[20]*Id.* at 1042.

[21]McDavid at 418.

[22]*Id.*

[23]572 F. Supp. 802 (S.D. Ohio 1983).

[24]*Id.*; McDavid at 418.

[25]*Id.* at 811; McDavid at 419, n.111.

[26]Quentel at 155.

[27]858 F.2d 160 (4th Cir. 1988).

[28]*Id.* at 172; McDavid at 424, n.150. Chemicals which are released or deposited in combination are normally considered as one indivisible 'harm' because of synergistic effects and differing levels of toxicity.

[29]*Superfunds and Superliens: Super Problems for Secured Lenders*, [Analysis and Perspective] 50 Banking Rep. 580 (April 4, 1988).

[30]608 F. Supp. 1484 (D. Colo. 1985).

[31]*See, also, United States v. New Castle County*, 642 F. Supp. 1258, 16 Envtl. L. Rep. (Envtl. L. Inst.) 21,007 (D. Del. 1986); *United States v. Ward*, 618 F. Supp. 884 (E.D.N.C. 1985); *United States v. South Carolina Recycling and Disposal, Inc.*, 14 Envtl. L. Rep. 20,272 (D.S.C. 1984).

[32]*See* 42 U.S.C. § 9613(f) (Supp. V 1987).

[33]McDavid at 426; *see, United States v. Seymour Recycling Corp.*, 686 F. Supp. 6967 (S.D. Ind. 1988).

burden on responsible lenders. A right of contribution at least insures that other known responsible parties can be forced to pay their share of the damages and cleanup costs, if they have the financial means to do so.

In a recent Fourth Circuit case, the court decided that "it would be premature . . . to interpret the effect of settlement on the rights of nonsettling parties in contribution actions under CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2) (1987)."[34] The Court noted that "the relative culpability of each responsible party [should] be considered in determining the proportionate share of costs each party must bear."[35] However, the court in *Monsanto* declined to decide the question of contribution, but instead explained that "the defendants still [had] the right to sue responsible parties for contribution, and in that action assert both legal and equitable theories of cost allocation."[36] One judge dissented, explaining that under 42 U.S.C. § 9613(f)(1) responsible parties have the right to raise the question of contribution in the main case if they so choose, instead of bringing a separate action for the sole purpose of determining contribution.[37]

The judicial and statutory establishment of a right of contribution under CERCLA is especially important for responsible lenders. As noted before, lenders are vulnerable to being sought out as "deep pockets." With an established right of contribution, lenders may bring an action to recover any damages paid above and beyond the lender's fair share. Of course, this process is complicated because (1) known responsible parties are responsible for the liability of unknown or absent parties, and (2) other known responsible parties may be insolvent or otherwise unable to contribute.

C. Liens and Superliens

Under CERCLA, federal liens may arise on all real property and rights to such property subject to or affected by a federal removal or remedial[38] action.[39] The federal liens, which arise when the federal government first incurs response costs or when the person liable for costs first receives notice, may obviously impair a lender's security interest in property which is contaminated, or even in the borrower's other assets. The lien will continue until (a) liability is satisfied or (b) the statute of limitations runs.[40]

Federal liens pursuant to CERCLA and SARA are not by definition "superliens" which take priority over all other liens. However, if the party is in bankruptcy, the government is likely to argue that its claim arose first, or that the claim falls within a priority provision of the Bankruptcy Code.[41] If such arguments succeed, the government will have effectively imposed a "superlien."[42]

States may also have lien or superlien laws. Several states currently have superlien statutes.[43] These laws typically create a first-priority lien in favor of the state's environmental agency.[44]

D. Indemnity Provisions

CERCLA § 107(e) states that no indemnification, hold harmless, or similar agreement shall be effective to transfer from one owner, operator or other responsible person to any other responsible person the liability imposed under this section.[45] However, the provision continues by stating that nothing in the section "shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section."[46] In *Abcor, Inc. v. State Street Bank & Trust Co.*, the court did not challenge the indemnity agreement between State Street and New England, the new owner of Union National. One may conclude from *Abcor*[48] and § 9607(e) that indemnity agreements are valid and enforceable between the parties to such an agreement, but not between one of the parties and the government.

E. Miscellaneous Provisions

In order to promote a general working knowledge of CERCLA, a few additional provisions should be pointed out in addition to the "liability" and "defenses" sections:

(1) CERCLA § 101, or 42 U.S.C. § 9601, is the definition section of the statute. Please note the following *pertinent definitions*: damages (9601(b)); facility (9601(9)); guarantor (9601(13)); hazardous substance (9601(14)); owner and operator (9601(10)(A)-(D)); person (9601(21)); release (9601(22)); removal, remedial, and response (9601(23)-(25)); and contractual relationship (9601(35)).

(2) The *National Contingency Plan* which is referred to throughout the statute, is described in § 9605. Particularly pertinent to lenders is § 9605(a)(7), which requires as one of the minimum standards "assuring that remedial action measures are cost-effective."

(3) CERCLA § 9607(c) determines maximum amounts to be paid by any responsible party, and takes into consideration willful conduct, releases which violate existing safety standards, and refusal to cooperate with public officials.

(4) *Settlements* are specifically treated in CERCLA § 122, 42 U.S.C. § 9622. This provision is lengthy and detailed — certainly warranting a close reading.

III. Judicial Interpretation of Liability for Lenders Under CERCLA's "Owner and Operator" Provision

Under CERCLA, there are four categories of persons who are liable:

1. Past and present owners and opertors of a vessel or facility;
2. A person who owned or operated a facility during the time that hazardous substances were disposed of there;
3. A person involved with the transport of hazardous substances owned

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[34] *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 177.

[38] "Removal" and "remedial" are both terms statutorily defined in § 9601.

[39] [Analysis and Perspective] 50 Banking Rep. (BNA) 580, 583 (April 4, 1988); 42 U.S.C. § 9607(1).

[40] *Id.* at 583.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] 42 U.S.C. § 9607(e)(1).

[46] *Id.*

[47] C.A. No. 88-1324-K (D. Mass. 1988).

[48] *See, also, Chemical Waste Mgt. v. Armstrong World Indus.*, 669 F. Supp. 1285 (E.D. Pa. 1987).

or possessed by such person; and

4. Any person who transports hazardous substances to a disposal or treatment facility.[49]

The term owner or operator means:

> In the case of [a] . . . facility, any person owning or operating such facility . . .. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.[50]

A. Ownership

Under 42 U.S.C. § 9601(20)(A), 'owners or operators' are specifically excluded from liability if they, "*without participating in the management* of . . . a facility, *[hold] indicia of ownership primarily to protect [their] security interest* in the . . . facility."[51] This is referred to as the 'security interest exemption.' Congress unfortunately gave little direction for interpreting when a lender holds only 'indicia of ownership,' or when a lender has or has not 'participated in management.'

The legislative history, though still open to future interpretation by the courts, is instructive:

> [An "owner" under § 9607] does not include certain persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, [holds] title either in order to secure a loan or in connection with a lease financing arrangement under the appropriate banking laws, rules, or regulations . . .. [A] financial institution which held title primarily to secure a loan but also received tax benefits as the result of holding title would not be an "owner" as long as it did not participate in the management or operation of the vessel or facility.[52]

This explanation at least tells us that lenders will not be held responsible as 'owners' if, for example, they hold title (primarily) to secure a loan, or if in a mortgage arrangement in a title theory jurisdiction the lender holds title. However, the courts have yet to establish a judicial standard that gives lenders clear guidelines as to when they simply hold indicia of ownership, or when they may be liable for cleanup costs as an 'owner or operator' under CERCLA.

In *United States v. Maryland Bank & Trust Co.*,[53] the court was called upon to interpret CERCLA § 107(a)(1) and § 101(20((A) to determine whether a foreclosing lender was an 'owner or operator,' and thus responsible for environmental cleanup costs. In this case, Maryland Bank & Trust Co. had loaned money to the property owner for his sanitation and disposal businesses. The bank later approved a loan to the property owner's son for the purchase of this property from his parents. In 1981, the son defaulted on his loan. The bank instituted a foreclosure action and purchased the property at the foreclosure sale. Hazardous wastes were later discovered at the site. The bank declined to initiate corrective action so the EPA cleaned up the site (at a cost of $551,713.50) and demanded payment from the bank.

Maryland Bank & Trust Co. argued that only three of the four elements required for a *prima facie* case under § 107(a) had been established, and that the fourth element could not be met since the bank was not an "owner and operator" under § 107(a) and § 101(20)(A) of CERCLA.[54] Maryland Bank & Trust Co. reasoned that on the basis of the definition of "owner or operator," purchasing at the foreclosure sale exempted it from liability even if it might otherwise be "a person who has owned, operated, or otherwise controlled activities" at the disposal facility:

> "Owner or operator" means . . . (iii) in the case of an abandoned facility, any person who owned, operated or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of . . . a facility, holds indicia of ownership primarily to protect his security interest in the . . . facility. 42 U.S.C. § 9601(20)(A).[55]

The court disagreed, and explained that "the exemption of subsection (20)(A) covers only those persons who, at the time of the cleanup, hold indicia of ownership to protect a then-held security interest in the land."[56] The court stated specifically that "the security interest must exist at the time of the cleanup," and that the security interest — in this case a mortgage held by Maryland Bank & Trust — was terminated at the foreclosure sale when full title was gained by another.[57] Here, "indicia of title" transformed into full title and thus full ownership when the bank purchased the property at the foreclosure sale.

Maryland Bank & Trust next argued that even if it was an "owner," it was not an "operator" of the facility, so it was not liable as an "*owner and operator*" under CERCLA § 107(a).[58] The court again disagreed with the bank's reasoning and explained that a party "need not be both an owner and operator to incur liability under [S 107(a)(1)]."[59]

United States v. Maryland Bank & Trust is important for lenders because it addresses a common circumstance for banks and other lending institutions: foreclosure after a default. *Maryland Bank & Trust* establishes two rules under CERCLA:

(1) A purchaser at a foreclosure sale[60] becomes an 'owner' within the meaning of § 107(a); and

(2) An owner need not also be an operator to be liable under CERCLA. It is sufficient for liability purposes if a person is either an owner or an operator.

In *In re T. P. Long Chem., Inc.*,[61] and *United States v. Mirabile*,[62] both decided

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[49]42 U.S.C. § 9607(a) (Supp. V 1987).

[50]42 U.S.C. § 9601(20)(A) (Supp. IV 1986).

[51]42 U.S.C. § 9601(20)(A) (Supp. V. 1987).

[52]H.R. Rep. No. 172, 96th Cong., 2d Sess., pt. 1, at 36, *reprinted in* 1980 U.S. Code Cong. & Admin. News 6160, 6181; Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 Yale L. J. 925, 926 n.13 (1989).

[53]632 F. Supp. 573 (D. Md. 1986).

[54]CERCLA § 107(a) provides that "(1) the owner and operator of a vessel . . . or a facility . . . shall be liable."

[55]*Maryland Bank & Trust*, 632 F. Supp. at 577.

[56]*Id.* at 579.

[57]*Id.*

[58]*See, also, Artesian Water Co. v. Gov. of New Castle County*, 659 F. Supp. 1269 (D. Del. 1987); *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984).

[59]*Id.* at 577.

[60]A mortgagee who forecloses but does not (bid or) purchase the property at the foreclosure sale "would apparently [be insulated] . . . from liability." *Maryland Bank & Trust*, 632 F.2d at 580 n.6.

[61]22 Env't Rep. Ca. (BNA) 547 (Bankr. N.D. Ohio 1985).

[62]15 Envtl. L. Rep. (Envtl. L. Inst.) 20,992 (E.D. Pa. 1985).

before *Maryland Bank & Trust*, similar issues of ownership were discussed. In *In re T.P. Long Chemical, Inc.*, the court addressed the issue of "whether a lender who held a perfected security interest in the debtor's personal property had become an owner or operator of a bankrupt hazardous waste site."[63] The court held that the bank was not liable under CERCLA, and stated that even "had a bank repossessed its collateral in a toxic waste dump pursuant to its security agreement, it would have qualified for the 101(20)(A) [security interest exception], and hence escaped liability."[64] Even though *T.P. Long* does not decide how foreclosure would have affected the bank's status as an 'owner,' it is a clear example of a lender merely protecting its security interest without participating in management. The court accordingly applied the security interest exemption to liability as stated in CERCLA § 101(20)(A).

In *United States v. Mirabile*, the court did decide whether a lender's foreclosure created liability under § 101(20)(A). In *Mirabile*, American Bank foreclosed on its mortgage and purchased the property at the foreclosure sale. The bank then promptly assigned the title it had received at the sheriff's sale. In *Mirabile*, the bank's conduct, including the purchase of the land at the foreclosure sale, was "plainly undertaken in an effort to protect its security interest in the property."[65] *Mirabile* is informative for lenders in many respects,[66] but it is important to note that *Maryland Bank & Trust* expressly disagrees with *Mirabile*'s broader reading of the security interest exemption.[67]

In *Tanglewood East Homeowners v. Charles-Thomas, Inc.*,[68] a lending institution sought to establish that the only 'owner and operator' liable under CERCLA was the one responsible for discharging hazardous substances.[69] However, the court determined that the statutory language does not "exclude present owners of properties previously contaminated."[70] The court also stated that past owners or operators (at the time of hazardous waste disposal or release) are liable parties under §107(a)(2).[71]

In *United States v. Carolawn Co.*,[72] where a bankrupt former owner transferred title to the defendant corporation who in turn transferred title only one hour later, the court held that summary judgment for the defendant was not appropriate. The court reasoned that "the defendant [may have] retained sufficient control over the site to qualify as an owner," and that further inquiry concerning the legal or equitable interest retained by the defendant was needed to determine the defendant's possible CERCLA liability.[73]

In *New York v. Shore Realty Corp.*,[74] the current owner, Shore Realty, argued against liability on the ground that "it neither owned the site at the time of disposal nor caused the presence or the release of the hazardous waste at the facility."[75] However, the court determined that § 9607(a)(1), which applies to all current owners and operators, and § 9607(a)(2), which primarily covers prior owners and operators, are properly interpreted as creating liability for Shore Realty. The court's distinction between current and prior owners provides an important guideline:

> [1] Prior owners and operators are *liable only if* they owned or operated the facility "at the time of disposal of any hazardous substance"; and
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> [2] this ["at the time of disposal"] limitation does not apply to current owners. (*i.e.*, liability may be imposed upon a current owner even if the disposal occurred years earlier).[76]

The court's explanation of current-owner liability vs. prior-owner liability could certainly be of practical effect for lenders. This distinction seems to clearly admit that a lender who owned property after disposal occurred but who sold before hazardous wastes were discovered could not be held liable as either a 'current owner' or a 'prior owner' within CERCLA § 107(a). This point, while not a major breakthrough in avoiding liability, may be of some consolation to lenders and other 'owners.'

The Fourth Circuit has also decided the issue of ownership liability under CERCLA § 107(a). In *United States v. Monsanto*,[77] the court held the current owners of a hazardous waste site liable regardless of their degree of participation in the disposal of hazardous waste at the site. The site owners in *Monsanto* were owners at the time hazardous substances were deposited, and thus under § 107(a)(2) could be held liable for "all costs of removal or remedial action if a release or threatened release of a hazardous substance occurs."[78] Of course, under the *Shore Realty* rule, Monsanto's status as a current owner would have been enough to impose liability regardless of when the disposal occurred or whether they caused the release.

B. Operators

Under CERCLA's 'owner and operator' provisions, liability may be imposed if a party is either an owner or an operator. *United States v. Maryland Bank & Trust Co.*,[79] Accordingly, cases have tended to address each element separately.

As explained above, the statutory definition of owner-operator exempts "a person, who, *without participating in the management of a vessel or of a facility*, holds indicia of ownership primarily to protect a security interest in the vessel or facility."[80] The legislative history is unclear, and no clear guidelines exist for lenders concerning how much control, or "participation in management," is enough to impose operator liability pursuant to CERCLA § 107(a). The sparse legislative history, "taken together with traditional principles of commercial lending, [seems to suggest] that a lender with a security interest in contaminated property would need to possess some additional evidence of ownership or be totally responsible for [a facility's] operation"

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[63] Quentel, 1988 Wis. L. Rev. at 161.

[64] *Maryland Bank & Trust*, 632 F. Supp. at 580.

[65] *Maryland Bank & Trust*, 632 F. Supp. at 580.

[66] See part III(B) of this text for a discussion of *Mirabile*'s interpretation of 'operator' and 'participation in management.'

[67] *Id.* at 580.

[68] 849 F.2d 1568 (5th Cir. 1988).

[69] *Id.* at 1572.

[70] *Id.*

[71] *Id.* at 1273.

[72] 14 Envtl. L. Rep. (Envtl. L. Inst.) 20,693 (D.S.C. 1984).

[73] *Id.*

[74] 759 F.2d 1032, 1043-1044 (2d Cir. 1985).

[75] *Id.*

[76] *Shore Realty*, 759 F.2d at 1044.

[77] 858 F.2d 160, 168-169 (4th Cir. 1988).

[78] *Id.*

[79] 632 F. Supp. 573, 577 (D. Md. 1986).

[80] *Superfunds and Superliens: Super Problems for Secured Lenders*, [Analysis and Perspective] 50 Banking Rep. (BNA) 580 (April 4, 1988); *see*, 42 U.S.C. § 9601(20)(A).

before liability under § 107 could be imposed.[81] However, the case law is not so clear.

In *United States v. Mirabile*,[82] the issue of "participation in management" was addressed. In that case, Mellon Bank, a creditor, "sent two advisors, [at least] one of whom may have participated in day-to-day nonfinancial management decisions," to the facility in question.[83] The court discusses in some detail the activities of two of Mellon's loan officers. One officer participated in the [operator's] advisory board which, the court concludes, "gave general financial advice and did not discuss production or waste disposal."[84] The court specifically states in *Mirabile* that summary judgment would have been granted for Mellon on the issue of liability as an "operator" if that loan officer's conduct was the only evidence of participation by Mellon.

The second loan officer's conduct gave the court more problems. He testified that Mellon "wanted him to have more of a day-to-day hands-on involvement," which included "monitoring the cash collateral accounts, ensuring that receivables went to the proper account, and establishing a reporting system between the company and the bank."[85] However, even this level of participation was not enough to find CERCLA liability, according to the court.[86] The testimony which defeated Mellon's motion for summary judgment, although it was, in the court's view, "slender" evidence indeed, stated that the loan officer visited the plant once a week, determined what orders would be filled first, and insisted on certain manufacturing changes and reassignments of personnel.[87]

Mirabile provides the most detailed discussion concerning when specific conduct may be "participation in management" within the meaning of CERCLA. Unfortunately, the parties settled the case before Mellon's liability under CERCLA was ever decided. Consequently, we will never know whether Mellon would have qualified under the security interest exemption.[88]

More recently, the court considered CERCLA's operator provision in a case in which a lender did not foreclose under its security interest in the real property, but did foreclose pursuant to its security interests in some of the plaintiff's equipment and inventory.[89] The plaintiffs in *Fleet Factors* argued that Fleet's activities at the facility before foreclosure, namely checking customers' credit before the plaintiff shipped goods to them in order to protect their interest in the accounts receivable, along with their entering onto the property and allegedly moving hazardous waste-filled barrels in preparation for an auction, constituted participation in management pursuant to CERCLA. The court disagreed with the plaintiffs, and relied on *Mirabile* to fashion a somewhat pro-lender decision. *Fleet Factors* cites *Mirabile* for the proposition that the security interest exemption has some practical application in a case like *Fleet Factors*:

> [The Court interprets] the phrases "participating in the management of a . . . facility" and "primarily to protect his security interest," to permit secured creditors to provide financial assistance and general, and even isolated instances of specific, management advice to its debtors without risking CERCLA liability if the secured creditor does not participate in the day-to-day management of the business or facility either before or after the business ceases operation.[90]

Similarly, as discussed above, *Mirabile* holds that CERCLA liability does not apply where the secured creditor fails to become 'overly entangled in the affairs' of the actual owner or operator of a facility.[91] The court concluded in *Fleet Factors* that Fleet's activities "did not rise to the level of participation in management sufficient to impose CERCLA liability.[92] The decision in *Fleet Factors* has been appealed and was due for decision by the United States Court of Appeals for the Eleventh Circuit in the fall of 1989.[93]

United States v. Dart Indus., Inc.,[94] is factually dissimilar from *Fleet Factors* but follows its reasoning. In *Dart*, the Fourth Circuit was faced with the question of whether South Carolina's Department of Health and Environmental Control (DHEC) could be held liable under CERCLA for its role in regulating the activity at a hazardous waste site. The court found that DHEC never exceeded its governmental supervisory role, and implied that no liability can be created unless some sort of direct management of employees, finances and the like is shown. Otherwise, absent some sort of direct management, DHEC did not "participate in management" within the meaning of CERCLA § 101(20)(A).

In *United States v. Nicolet*,[95] in an opinion issued to dispose of pre-trial motions, the court stated that mortgagee liability for cleanup costs exists "only if the mortgagee participated in the managerial and operational aspects of the facility in question."[96] The court in *Nicolet* relies on both *Mirabile* and *Fleet Factors* in fashioning a rule, but comes up with a *broader* interpretation of when mortgagees or lenders may be liable under CERCLA. The court specifically notes that day-to-day control by mortgagees is required under *Mirabile* and *Fleet Factors*, but it fails to use such language. The *Nicolet* court instead describes the minimum conduct required to invoke liability as 'participation in the managerial and operational aspects' of the business.

In addition to addressing level of con-

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[81] *Id.* at 581.
[82] 15 Envtl. L. Rep. 20,992 (E.D. Pa. 1985).
[83] *Id.* at 20,994.
[84] *Id.* at 20,997.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 20,997.
[88] *See*, 23 E.R.C. 1510 (1985).
[89] *United States v. Fleet Factors Corp.*, 19 Envtl. L. Rep. 20,529 (S.D. Ga. 1988).
[90] *Id.* at 20,531.
[91] *Id.*
[92] *Id.*
[93] *U.S. v. Fleet Factors Corp.*, No. 89-8094 (11th Cir.).
[94] 487 F.2d 144 (4th Cir. 1988).
[95] No. 85-3060 (E.D. Pa. 1989).
[96] *Id.*; 53 Banking Rep. (BNA) 20 (July 3, 1989).

trol, the court denied a motion for summary judgment by the parent corporation (T&N) of a prior owner-subsidiary (Keasbey). Keasbey owned and operated the facility in question at the time the hazardous material was manufactured and deposited at the site. At most relevant times, "T&N owned all of Keasbey's stock and maintained a mortgage on the property."[97] Keasbey is now defunct, and the government is asserting two main theories for liability against T&N. First, the government is asserting that T&N is Keasbey's alter ego, and thus, should be liable.[98] Second, the government asserts *direct* CERCLA liability based upon three theories construing the owner and operator provision:

> [1] The parent should be held liable because it was [the subsidiary's] sole stockholder and actively participated in the management [when the dumping occurred];
>
> [2] [the parent corporation should be liable] because it knew about [the subsidiary's] dumping practices and had the power to avoid the resulting environmental harm; and
>
> [3] [the parent corporation should be liable] because it held a mortgage on [the subsidiary's] property and actively participated in management of the facility.[99]

Lenders should pay close attention to *Nicolet* as it progresses, since the court has initially found that each of the direct liability theories, if proven, "may entitle the United States to the relief requested."[100]

Another recently filed action which lenders should follow closely is *Abcor, Inc. v. State Street Bank & Trust Co.*,[101] The case is still in discovery, and is based upon the underlying issue of "whether or not State Street Bank became the owner-operator of the site when it attempted to recover on a loan to [the now bankrupt prior owner who abandoned the site in 1977]."[102] The facts of *Abcor* are essentially as follows: Silresim Chemical Corp. operated a licensed hazardous waste disposal facility in the 1970s. Union Bank of Lowell, Massachusetts, which was purchased by State Street in the 1970s, held a mortgage on the Silresim site. In 1975, Silresim defaulted on its loan; the bank never foreclosed but "hired a consultant to operate and direct activities at Silresim."[103] Silresim "declared bankruptcy and abandoned the site" in 1977.[104] Furthermore, State Street sold Union National in 1983 to Bank of New England, but Bank of New England was indemnified against any liability when it purchased Union National.[105]

Currently, State Street, in an effort to avoid protracted litigation but without admitting liability has agreed "to pay 15% (percent) of the costs already incurred by the federal government in the cleanup of [the site]."[106] The *Abcor* lender liability action was filed against State Street by over 200 companies that are also potentially responsible parties, including some large manufacturers (Monsanto Co., Dow Chemical Corp., General Electric Co., Texas Instruments, Inc., Ciba-Geigy Corp.) that disposed of waste at the site.[107] The EPA is expected to make a settlement proposal for reimbursement of its expenses incurred for cleanup.[108] However, if the *Abcor* case makes it to trial and State Street *is not held liable* under CERCLA § 107, the decision could prove an important precedent for halting any further expansion of lender liability.[109]

C. Liability of Parent Corporations Under the "Owner and Operator" Provision

As mentioned in the early discussion of *United States v. Nicolet*,[110] a few cases exist which establish possible liability for parent corporations.[111] In *Idaho v. Bunker Hill Co.*,[112] the defendant-parent corporation, Gulf, was found to have been sufficiently involved in the management and operations of its subsidiary, Bunker Hill, to warrant imposition of CERCLA liability.[113] Gulf controlled a majority of the members of Bunker Hill's board of directors, received weekly reports on Bunker Hill's day-to-day operations, and retained authority to approve any expenditures greater than $500.00 on pollution matters.[114] Furthermore, "Bunker Hill's authorized capital was a mere Eleven Hundred Dollars ($1100.00) while Gulf received Twenty-seven Million Dollars ($27,000,000.00) in dividends from Bunker Hill."[115] The court concluded that Gulf's control was sufficient to impose liability, but explicitly stated:

> The court is mindful that . . . care must be taken so that "normal" activities of a parent with respect to its subsidiary do not automatically warrant finding the parent an owner or operator. To hold otherwise in the instant action, however, would allow the corporate veil to frustrate congressional purpose [in holding culpable parties responsible for the burdens of hazardous waste disposal].[116]

The court in *Nicolet* adopts *Bunker Hill's* reasoning for corporate veil-piercing and states that the government may be able to impute the subsidiary's liability to the parent corporation if it can prove the alleged involvement of the parent in man-

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[97] 53 Banking Rep. (BNA) at 21.

[98] The alter ego, or veil-piercing theory will be discussed, *infra*, in III(C).

[99] *Nicolet*, No. 85-3060 (May 10, 1989); 53 Banking Rep. (BNA) at 21.

[100] *Id.*

[101] C.A. No. 88-1324-K (D.C. Mass. Aug. 21, 1988).

[102] 53 Banking Rep. (BNA) 313, 314 (Aug. 28, 1989).

[103] *Id.* at 314.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 313.

[107] *Id.* at 314.

[108] *Id.* at 313.

[109] *Id.* at 314.

[110] *See* part III(B) of this text for a discussion of *United States v. Nicolet* and its analysis of the level of control required for 'operator liability' based upon 'participation in management.'

[111] *See, also, New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) (sole shareholder of undercapitalized corporation who dominated corporation held personally liable on state law theory other than piercing corporate veil).

[112] 635 F. Supp. (D. Idaho 1986).

[113] *Id.* at 671-672.

[114] *Id.* at 672.

[115] *Id.*

[116] *Id.*

agement and operations. *Nicolet*'s decision is based on federal law rather than state law:

> Where a subsidiary is or was at the relevant time a member of one of the classes of persons potentially liable under CERCLA; and the parent had a substantial financial or ownership interest in the subsidiary; and the parent corporation controls or at the relevant time controlled the management and operations of the subsidiary, the parent's separate corporate status may be disregarded.[117]

The above cases are instructive for lenders for three reasons. First, they demonstrate the distinct and separate analysis required to determine (a) whether one is an operator, or (b) whether one is an owner. *Ownership is not required* for CERCLA liability if the government can establish "participation in management" sufficient to impose 'operator' liability. Second, and maybe even more significant for lenders, these two cases seem to allow more involvement by the parent corporation before the court will find "participation in management." Granted, standard corporate practices are not necessarily the same as standard banking or lender practices. But the situations are analogous in the 'operator' context, and the *Bunker Hill* and *Nicolet* cases could be utilized by lenders as a more favorable precedent for interpreting "participation in management." Finally, these cases are potentially significant in analyzing potential liability of bank holding companies.

IV. Statutory Defenses Available Under CERCLA and SARA

Under CERCLA, only three express statutory defenses are provided in an otherwise 'strict liability' statute.[118] A party may avoid liability if the release or threatened release (1) was caused by an act of God,[119] (2) was caused by an act of war, or (3) was caused by an act or omission of a third party other than an employee or agent of the defendant or . . . in connection with a contractual relationship with the defendant.[120] However, these defenses have been construed narrowly by the courts. As a result, even unwitting purchasers of contaminated property who have used these defenses have encountered little success.[121] After much criticism concerning CERCLA's unfairness to innocent purchasers, Congress amended the third-party defense by excluding from the term 'contractual relationship' land contracts when "the real property . . . was acquired by the defendant after disposal or placement of the hazardous substance on, in, or at the facility . . .."[122] However, this exclusion from the term 'contractual relationship' applies only if the defendant also proves the existence of one or more of the following circumstances by a preponderance of the evidence:[123]

> The defendant (1) must either not have known or not have had reason to know the waste was located on the site; (2) must have been a government acquiring the property through condemnation or escheat; or (3) must have acquired the property by inheritance or bequest. [*See*, 42 U.S.C. § 9601(35)(A)(i)-(iii).][124]

Congress' amendment to absolve the innocent landowner from liability is narrowly drawn. In addition to the above requirements, a defendant asserting this defense must also establish that "prior to purchase, he or she diligently inspected the land and found no evidence that waste was contained thereon."[125] This is commonly referred to as the "all appropriate inquiry" requirement, and is a prerequisite to proving that the defendant "did not know and had no reason to know" of the presence of hazardous substances.[126] Finally, the requirements set out in § 9601(35)(A)-(B) are *in addition to* the original requirements under CERCLA for establishing the third-party defense. SARA essentially entitles a party to the third-party defense despite the contractual relationship if the § 9601(A) and (B) requirements are fulfilled.[127]

A. The Third-Party Defense

The third-party defense allows more room for fashioning a legal or factual argument than the other two statutory defenses described in CERCLA § 107(b). Section 107(b)(3) provides that no liability will exist if the current owner can prove three elements:

> (1) the sole cause of the damage was the act or omission of a third party; (2) the third party was not an employee or agent or directly or indirectly in a contractual relationship with the current owner; and (3) he exercised due care and took precautions against foreseeable acts or omissions of the third party. [*See*, 42 U.S.C. § 9607(b)][128]

The responsible party in *New York v. Shore Realty Corp.*,[129] was one of the first to assert CERCLA's third-party defense. In *Shore Realty*, Shore acquired the site in question for land development purposes with knowledge that hazardous wastes were stored there. After taking title in 1983, approximately 90,000 gallons of chemicals were added to the tanks at the site. The court, based on these facts, disagreed that third parties were solely responsible, or that Shore had exercised due care since taking control of the site.[130] Thus, Shore Realty failed to successfully establish the defense.

In *United States v. Maryland Bank & Trust Co.*,[131] the current title holder, Maryland Bank & Trust, asserted the third-party defense. The government, however, claimed that the bank could not meet its burden of proof for the defense.[132] The government reasoned first that the bank had established a close contractual relationship with the prior owner of the site.

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[117]53 Banking Rep. (BNA) at 21; *see, United States v. Nicolet*, No. 85-3060 (E.D. Pa. May 10, 1989).

[118]*See*, 42 U.S.C. § 9607(b) (1982).

[119]*Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2d Cir. 1986) discusses lightning as in act of God.

[120]42 U.S.C. § 9607(b).

[121]Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 Harv. Envtl. L. Rev. 385, 396 (1988).

[122]*Id.*; 42 U.S.C. § 9601(35)(A) (Supp. V 1987).

[123]A defendant who pleads one of these statutory defenses has the burden of proof. Reference to showing circumstances by "preponderance of the evidence" simply establishes expressly the standard by which the defendant must carry that burden.

[124]*Glass*, 12 Harv. Envtl. L. Rev. at 396.

[125]*Id.* at 397; 42 U.S.C. § 9601(35)(B).

[126]*See*, 42 U.S.C. § 9601(35)(A)(i) and (B) (One must read (A)(i) in conjunction with (B) to understand the full requirements of the innocent landowner defense).

[127]McDavid, 23 U. Rich. L. Rev. at 423.

[128]*Id.* at 416.

[129]759 F.2d 1032 (2d Cir. 1985).

[130]*Id.* at 1039, 1048.

[131]632 F. Supp. 573 (D. Md. 1986).

[132]*Id.* at 581.

Second, the government reasoned that the bank could not prove that it exercised due care with respect to the wastes at the site since it had taken title to the property.[133] The court denied summary judgment on this entire issue, explaining that the evidence did not clearly demonstrate the nature of the bank's contractual relations with the prior owner during the time of disposal. Furthermore, the court found that a factual question remained as to the reasonableness of the bank's conduct with respect to the site.[134] There are no published opinions beyond the District Court level for *United States v. Maryland Bank & Trust Co.* Accordingly, it is only instructive in showing what type of factual situation is likely to survive an opposing summary judgment motion.

CERCLA's third-party defense was again asserted, though unsuccessfully, in *United States v. Monsanto Co.*.[135] The current owner in *Monsanto* failed to establish the defense in part because it conceded the existence of a lease agreement with a prior operator of the site in question. The current owner also had difficulty showing that it took precautionary measures against the foreseeable conduct of the prior owners and operators.[136] In addition, the court describes the current owner's failure to inspect the site as a "willful or negligent blindness" not sanctioned by the statute.[137]

Other cases which have construed the third-party defense have reached conclusions similar to *Shore Realty, Maryland Bank & Trust* and *Monsanto*. For example, the defense failed in *Washington v. Time Oil Co.*.[138] based on (1) an insufficient showing of sole causation, and (2) a failure to exercise due care where the current owner simply sought a preliminary injunction against a 'sloppy operation.'[139] In *Philadelphia v. Stepan Chemical Co.*,[140] a city failed to establish its third-party defense because the act or omission which caused the release of hazardous substances was *not* caused by a third party.[141] The 'actors' in *Stepan Chemical* were employees of the city.

CERCLA's third-party defense has been narrowly interpreted and consequently has provided little help to those parties otherwise responsible under § 107. Current owners will need to present a more complete factual case in order to succeed in asserting this defense in the future.

B. The Innocent Landowner Defense

The innocent landowner defense[142] is not really a separate statutory defense under CERCLA. It is more accurately described as creating an additional class of persons entitled to assert CERCLA's original third-party defense.[143] Widespread criticism of CERCLA's harsh results led to the inclusion of some third-party defense amendments under SARA. Section 107(b)(3) remained unchanged, but SARA revised the definition of "contractual relationship" as it applies to § 107(b)(3).[144] The revised definition excludes current owners from the term in certain circumstances if "the real property . . . was acquired by the defendant after disposal or placement of the hazardous substance on, in, or at the facility . . .."[145]

The defendant asserting the innocent landowner defense must establish that the property was acquired by escheat, condemnation, inheritance, or bequest, or that the defendant did not know or have reason to know that waste was located on the site.[146] The last element, clearly the most applicable to lenders, is qualified by additional statutory language requiring diligent inspection of the site prior to purchase.[147] This "appropriate inquiry" requirement is based in part upon "on the buyer's specialized knowledge or experience, commonly known or reasonably ascertainable information about the property, and the ability to detect such contamination by appropriate inspection."[148] The correlation between the purchase price and the actual value of the land if not contaminated is also an important factor.[149]

Only time will tell how effective SARA's 'new defense' will be in protecting innocent parties. However, a few factors may be used as predictors, like the availability of other solvent responsible parties.[150]

C. Miscellaneous Defense Options for Lenders

To date, the case law suggests that the statutory affirmative defenses available to lenders require an almost unattainable showing of "innocence." Some responsible parties have accordingly looked for other defenses. For example, some defendants have relied on proving the plaintiff's failure to establish the elements of a *prima facie* case[151] under CERCLA.[152] Essentially, the following arguments could be made: (1) the substance at the site is not "hazardous"; (2) no release or threatened release occurred; (3) the defendant is not a covered person under § 107; (4) the land involved is not a "facility"; (5) the costs claimed were not "response costs"; and (6) the costs incurred were not consistent with the National Contingency Plan.[153]

Equitable defenses may be asserted under CERCLA. Although courts have been reluctant to allow tort and corporate defenses, equitable defenses have been held appropriate.[154] In *Mardan Corp. v. C.G.C. Music, Ltd.*,[155] in a private CERCLA action by a site purchaser, the court held that the equitable defense of unclean hands was available to the seller because the purchaser had also disposed of wastes on the site.[156] Laches might also be successfully asserted as a CERCLA defense, depending on the circumstances of the case.[157]

V. Current Trends in Limiting CERCLA Liability for Lenders

Two bills are currently under consideration in the United States House of Representatives which propose to limit CERCLA liability for banks and other

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[131]*Id.*

[132]*Id.*

[133]858 F.2d 160 (4th Cir. 1988).

[134]*Id.* at 169.

[135]*Id.*

[136]687 F. Supp. 529 (W.D. Wash. 1988).

[137]McDavid, at 417.

[138]18 Envtl. L. Rep. (Envtl. L. Inst.) 20,133 (E.D. 1987).

[139]McDavid at 417.

[140]*See*, 42 U.S.C. § 9601(35) and § 9607(b)(3).

[141]*See*, McDavid, at 421-424.

[142]*See, also*, the previous discussion of the innocent landowner defense in I and IV.

[143]*Glass*, 12 Harv. Envtl. L. Rev. at 396.

[144]42 U.S.C. § 9601(35)(A).

[145]42 U.S.C. § 9601(35)(B).

[146]50 Banking Rep. (BNA) at 582.

[147]*Id.*

[148]*Glass*, 12 Harv. Envtl. L. Rev. at 397.

[149]*United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 190-91 (W.D. Mo. 1985) defines a *prima facie* case under CERCLA.

[150]*Glass* at 398.

[151]*See*, Glass, *Superfund and SARA: Are There Any Defenses Left?*, 12 Harv. Envtl. L. Rev. 385 (1988) (detailed discussion of alternative defenses under CERCLA).

[152]*Id.* at 432-433.

[153]600 F. Supp. 1049 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986).

[154]50 Banking Rep. (BNA) at 582.

[155]*Id.* at 433, n.342-344.

financial institutions. The first, introduced by Rep. John LaFalce (D-NY), is designed to protect lenders from CERCLA liability "when they take title to foreclosed property or when they acquire contaminated realty as trustee of an estate."[158] In LaFalce's opinion, CERCLA provides "a very difficult standard for which there is minimal guidance [for lenders] at this time."[159] His bill, H.R. 2085, would specifically exclude "commercial lending institution[s] which [acquire] ownership or control of a property to realize on a security interest held by the person in that property" and "corporate fiduciar[ies]" which acquire title "for administering an estate or trust for which such property is a part" from liability under CERCLA's owner-operator provision.[160]

The second bill, authored by Rep. Curt Weldon (R-Pa.), is designed to spell out what steps will satisfy the "all appropriate inquiry" element of the innocent landowner defense under SARA. H.R. 2787 would create a clear guideline for lenders: an investigation of the environmental status of property would include historical research, comprehensive government records review, and on-site inspection of the property.[161] However, on-site testing would not be required unless some indication of a release or threatened release is evident from the initial three steps.[162]

H.R. 2085 and H.R. 2787 demonstrate the frustration and dissatisfaction with CERCLA's present liability and affirmative defense scheme. Legislation such as this may eventually revise congressional policy as it is currently perceived by the courts. Given the purpose of these bills (to limit lender liability), and previous congressional reaction to criticism of CERCLA (the innocent landowner provision in SARA), the outlook for lenders is a positive one.

VI. Advice, Given Current Judicial Interpretations, for Avoiding Lender Liability Under CERCLA

The "rules" for creating or avoiding liability under CERCLA are as yet unclear. The innocent landowner defense is still waiting for judicial interpretation. However, some general guidelines for lenders can be formulated based upon both the case law and the statutory language of CERCLA and SARA. This section compiles a relatively complete list of ways to avoid liability under CERCLA and SARA. Remember that this is a new area of law and is far from settled, so many of these suggestions are somewhat speculative. The suggestions will be numbered for simplicity's sake.

(1) *Liens* - Lenders should check the appropriate records before making a loan *and* during the term of the loan to find out if any environmental liens have been recorded against the real or personal property of the borrower. Always check the state in which the property is located to determine whether it has a lien or superlien statute. A lender's periodic reviews can be facilitated by requiring the borrower to provide notice of any potential responsibility for environmental cleanup.[163]

(2) *Foreclosure* - A safe general rule is that a lender should avoid any more control over the borrower than is necessary to preserve a security interest. In the context of foreclosure, this means lenders should only hold property as long as necessary in order to obtain a reasonable price for their security.[164] Of course, the safest tactic is not to foreclose at all or to seek appointment of a receiver. However, activities after foreclosure should be carefully designed to preserve the estate while avoiding any actions which might be construed as effecting the environmental conditions of the property.[165]

A related tactic, collateralizing the loan with assets other than the real property, may provide more safety from security interest losses due to CERCLA. However, be aware of state superlien laws, some of which include creation of a superlien on all of the borrower's assets. Keep in mind that "other assets," such as hydraulic equipment and electrical transformers, may contain PCBs, and that many old buildings contain asbestos.[166]

(3) *Loans* - Lenders need to make sure that environmental liabilities are assumed by others (borrower, seller, guarantor) through some form of loan agreement. The lender may want to require guarantees from principals or third parties if the borrower appears to be high risk. Lenders should also require borrowers to covenant not to contaminate the property. Lenders should take care, when a loan is modified, to insure that "parties contractually liable for environmental liabilities are not inadvertently released from their obligations."[167]

(4) *Indemnity* - Indemnity or hold-harmless agreements are valid and enforceable under CERCLA § 107(e). They should be utilized to the fullest extent possible.

(5) *Ownership* - Once a lender takes title to a contaminated property through foreclosure or some other means, it should proceed with due care to halt all contaminating activities and to avoid aggravating existing conditions.[168] The lender should also avoid any post-foreclosure activities unless they are carefully designed to avoid involvement in any questions regarding the property's environmental condition. The property should be retained only long enough to get a fair price.

(6) *"Operator" Involvement* - Again, the general rule applies: avoid any unnecessary intrusion into your debtor's business affairs. Only absolutely necessary involvement to protect your security interest should be initiated. The cases suggest that while day-to-day involvement in management or operations will lead to CERCLA liability, having a member on an advisory board will not. Great discretion and caution should be exercised to avoid liability as an 'operator.'

(7) *Environmental Audits* - Environmental lender liability under CERCLA has spawned considerable activity within the ranks of environmental engineers. These professionals may be retained to thoroughly examine property to assess potential lender liability before entering into a loan transaction. However, it is admittedly difficult to pass the cost of such an audit to the bank's customers, especially where competing lenders do not require an audit.

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[158][Current Developments] 53 Envtl. Rep. (BNA) 17 (May 5, 1989).

[159]*Id.*

[160]*Id.*; *see*, 42 U.S.C. § 9607(a).

[161]53 Banking Rep. (BNA) 47 (July 10, 1989).

[162]*Id.*

[163]50 Banking Rep. (BNA) at 586 (Apr. 4, 1988).

[164]52 Banking Rep. (BNA) at 704 (March 20, 1989).

[165]*Id.*

[166]*Id.*

[167]*Id.*

[168]*Id.* at 587.

Rose Honored as Teacher of the Year at Barristers' Ball

Professor Charles P. Rose, Jr. was honored with this year's *Jurist* Excellence In Teaching award at the Barristers' Ball on March 24. The annual award is made by third-year students who vote each spring for the professor they believe best exemplifies excellence in teaching.

Rose's dedication as an instructor is well-known among his criminal law, criminal procedure, evidence and trial practice students. He is a past recipient of the award and has been recognized throughout his 18-year career at Wake Forest as one of the Law School's most outstanding teachers.

"I try to teach in such a way that a person doesn't only learn the subject matter, but also how to analyze a problem the way they would in practice," Rose said. "I try to strike the right balance between making students aware of the theoretical aspect of a problem as well as the practical application."

Rose said that his teaching style has not changed through the years, but that his effectiveness has improved through experience. And for all his students who have experienced one of his rites of passage — copying his outlines written in microscopic letters on the blackboard — Rose said there is a reason for not simply photocopying the material: it causes students to think about the outline as they reproduce it.

"I think it's a good thing," he said. "And I think the students think it's a good thing as well."

Charles Rose (photo by Gardner)

Over 300 people attended the Barristers' Ball, which was held in honor of Law Day at the Hyatt Hotel in downtown Winston-Salem. Following cocktails and dinner, Rose and other award recipients were named — including C. Woodrow Teague ('34), who was honored with the Distinguished Alumni Award for Service to the Profession.

When accepting his award, Teague reminded students of their prospective roles as attorneys: "Never forget that an attorney is an officer of the court — a professional, not a businessman ... (and) a professional's primary goal should be to render a service."

Judge Robert Potter (photo by Gardner)

Following the presentations, Judge Robert D. Potter of the United States District Court for the Western District of North Carolina addressed the audience. He spoke about the history of the federal courts, told anecdotes about the early days and reminded students that as professionals they will have certain responsibilities such as conducting adequate research to ensure that a client actually has a sufficient case to litigate. He mentioned three guidelines which all attorneys should follow: "Be honest to yourself ... be honest to the court ... be honest to your client."

Benfield Accepts Distinguished Chair in Law

Wake Forest's search for an outstanding scholar to fill its first Distinguished Chair in Law has led to the school's own list of outstanding graduates. Marion W. Benfield, Jr., a national authority on commercial law who received his L.L.B. from Wake Forest in 1959, accepted the new position in March and will start teaching at Wake Forest this fall.

Benfield currently holds the Albert E. Jenner, Jr. Chair at the University of Illinois School of Law. He has written four books and many articles on commercial law, including casebooks on Articles 3 and 4 of the Uniform Commercial Code.

"I'm delighted to be coming back (to Wake Forest)," Benfield said. "I've been happy over the years to watch the continued development of the Law School and the University . . . and I'm looking forward to being part of the continued growth."

At Wake Forest, Benfield plans to continue teaching courses in contracts, UCC and consumer law. He has also occasionally taught real estate finance.

After graduating from Wake Forest, Benfield worked as an assistant director at the Institute of Government in Chapel Hill for two years with a concentration in public school law. He then went into private practice in Hickory until 1963, when he started his teaching career at the University of Georgia School of Law. He has taught at a number of law schools and also holds a master of laws from the University of Michigan.

Among his numerous awards and positions, Benfield is a member of the Permanent Editorial Board of the Uniform Commercial Code, the Joint Editorial Board of the Uniform Land Acts, and the American Law Institute. He and his wife, Dalida, have eight children and 12 grandchildren.

Wake Forest University Black Law Student Association 1990 Scholarship Banquet

Pass It On

Wake Forest University's Black Law Student (BLSA) held its annual scholarship banquet at the Winston-Salem Hyatt on March 30, 1990. The program was dedicated to Nelson Mandela, and to Darryl Hunt, the recently released defendant in a capital case in North Carolina. The dedication symbolized the ideals on which American jurisprudence is based — freedom and justice.

Denise Hartsfield, President of BLSA, presided over the gala event. Dean Robert Walsh offered the welcome to community leaders, parents and many of the WFU law faculty. This year marked the first award of the BLSA scholarship for minority achievement at WFU. The scholarship was envisioned by five past BLSA members in 1983 to assist African American law students at Wake Forest. The initiators of the award were Lisa Caldwell, Marsha Grayson, Joal Hall, Jeannett Peace and Carol Waldron. They were each presented with plaques by BLSA members as a tribute to their efforts which fostered the scholarship.

Because of efforts by the law school the enrollment of black students has grown from one to a current enrollment of thirty-one. Those members have excelled in regional and national competitions. Additionally, members are involved in community self-help programs in Winston-Salem.

Patricia Russell-McCloud, J.D., delivered the keynote address. A graduate of Kentucky State University and Howard University School of Law, Ms. Russell-McCloud is president of Russell-McCloud and Associates of Atlanta. She is the former Chief of Complaints Branch, Mass Media Bureau, Federal Communications Commission, and she is certified to practice before the United States Supreme Court.

Law Student Douglas Armstrong (photo by Allen)

The address was a challenge to all to "pass it on" and become one of the cadre of individuals who will move forward into the '90s in positions of leadership. Russell-McCloud spoke of the urgency of the times. She noted the growth of the underclass, and that "many are trying to get to the table of opportunity and are told they are too late." She challenged members of BLSA to "pass it on and reach out beyond one's self for the benefit of all."

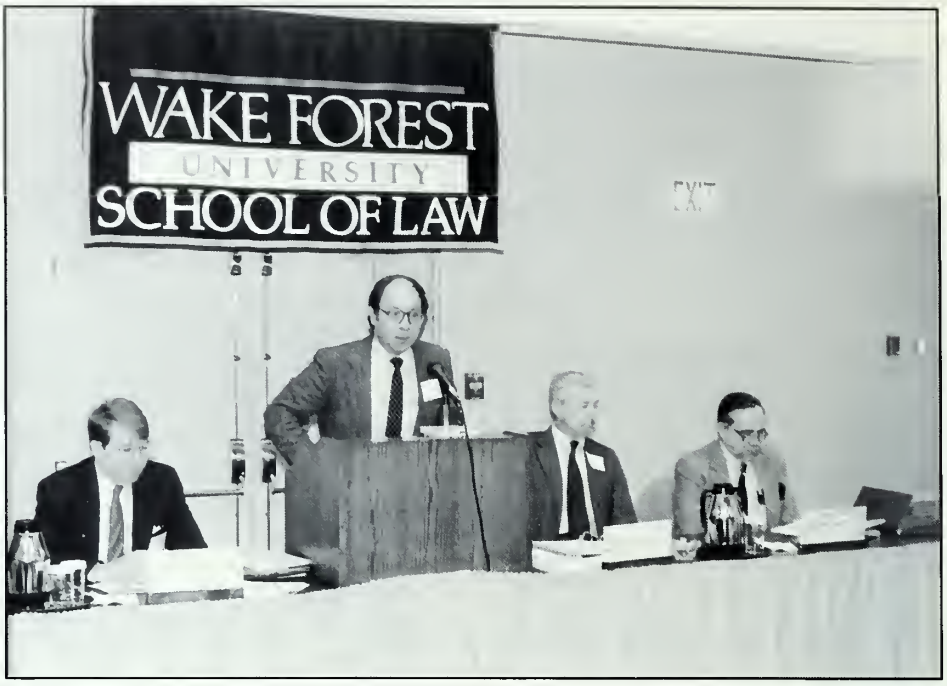
Res ipsa loquitor was invoked as she reminded BLSA that "powerful people never teach powerless people how to take power from them." Ms. Russell-McCloud closed her address by reminding the guests that no award will be give to the person who says everything is going fine.

The event ended with a tribute to current BLSA graduates of WFU and the "verdict" which was the singing of "Lift Every Voice and Sing," the Negro National Anthem.

Stephanie Brown, Karen Musgrave, Kathy Williams, John McLemore, Ronda Killens, Clayton Morgan, Glenda Wheeler and Grady Crosby enjoy the BLSA Banquet. (photo by Allen)

By Titus Heagins, a first-year student from Winston-Salem, NC.

Law Review's 1990 Business Symposium Attracts Leading Scholars to Discuss Management Buyouts



Speaker Thomas L. Hazen (photo by O'Brien)

Leading scholars and practitioners from across the nation gathered on March 30 at the Graylyn Conference Center in Winston-Salem for the fourth annual Business Law Symposium, sponsored by the Wake Forest Law Review. This year's topic was "Management Buyouts: Strategies, Ethics and Other Considerations."

The Symposium discussed the unresolved tensions inherent in MBOs, a form of corporate restructuring which has attracted much attention in recent years. Throughout the day-long Symposium, speakers addressed the complex issues of fairness and fiduciary duty for managers and the board of directors when managers offer to take private the very company which hired them.

Topics included: defining good faith in MBOs; what triggers the *Revlon* auction duty; the duty of directors to non-shareholder constituencies; the auction theory and property rights in corporate assets; assessing management justifications for blocking hostile takeovers; and legal responsibilities in MBOs in light of management's fiduciary duty. Speakers, who also wrote legal articles for the Symposium edition of the Wake Forest Law Review, presented their arguments and then were challenged by selected panelists and questions from the audience.

Speakers included Deborah A. DeMott, professor of law at Duke University Law School; Ronald J. Gilson, professor of law at Stanford Law School; Thomas L. Hazen, professor of law at the University of North Carolina School of Law; Roberta S. Karmel, professor of law at Brooklyn Law School and a partner with Kelley Drye & Warren in New York; Reinier H. Kraakman, professor of law at Harvard University Law School; Jonathan R. Macey, professor of law at Cornell Law School; and Detlev F. Vagts, Bemis Professor of Law at Harvard University Law School.

Panelists included The Honorable Stanley Sporkin, judge of the United States District Court for the District of Columbia; James S. Dockery, Jr., partner, Petree Stockton & Robinson; Harold L. Henderson, former General Counsel with RJR Nabisco, Inc.; John B. McKinnon, dean at Wake Forest's Babcock Graduate School of Management; Alice Pettey, partner, Womble Carlyle Sandridge & Rice; and professors H. Miles Foy III, Ralph A. Peeples and Alan R. Palmiter of the Wake Forest School of Law.

The Symposium was organized by the Law Review's symposium editors: Kenneth P. Carlson, Jr.; Kristen E. Gore; and Henry C. Roemer III.

Business Symposium Attendees (photo by O'Brien)

National Trial Team Advances in National Competition

For the second consecutive year the Wake Forest National Trial Team advanced to the Quarterfinals of the National Competition. This year's National Competition was held March 15-18 in Houston, TX.

Wake Forest's team consisted of third-year students Len Cohen, Rod Pettey, Nils Gerber and David Hall, and second-year students Denise Hartsfield and Lee Nelson. Cohen and Pettey represented the law school in Houston. Cohen was a member of last year's quarter finalist team as well. Both teams were advised by Professor Carol B. Anderson.

Approximately 220 teams competed in this year's tournament. Regional rounds were held in 11 cities. Twenty-two teams advanced from the regional rounds to the national competition.

Len Cohen and Rod Pettey (photo by Gardner)

Dean Gaudio Goes West

Above Associate Dean Arthur Gaudio's desk is a photo taken from a campsite in Wyoming. The scene draws your eyes over a clear blue lake to a group of rocky, snow covered mountains. As Dean Gaudio describes it, "this is God's country!" And when Dean Gaudio speaks of Wyoming, he seems convinced that some benevolent force led him to the University of Wyoming's Law School. Until now, the Gaudios only spent vacations — camping, hiking and skiing — out West. But this fall, Dean Gaudio will assume a permanent position as Dean of the University of Wyoming School of Law.

Although Dean Gaudio excitedly speaks of the opportunities that await him in Wyoming, he makes it clear that his four years at Wake Forest are treasured and held close to his heart. "I do have mixed feelings about leaving . . . there have been a lot of memories created by Wake."

Wake has been a place for Dean Gaudio's own personal growth and development as an administrator. When asked about his most challenging projects, Dean Gaudio speaks of his involvement in the periodic two year curriculum review for the law school. Over the past two years, Dean Gaudio motivated thought and discussion over the question of "what is a good curriculum for us here at Wake." The concern over what classes and activities serve our student body's and 25 faculty members' interests in terms of efficiency, progress and solid academics is of great importance. Dean Gaudio believes that Wake is in the "enviable position of being an all around excellent law school, with a traditional emphasis on litigation." He envisions the new professional building, scheduled for completion in the fall of 1992, not as a "law and business school," but as a place where law students can take advantage of opportunities offered by a close connection with the business world. Law students can use Babcock to expand and explore any interests they have in business.

Arthur Gaudio

Another challenge that developed Dean Gaudio's administrative skills was negotiating with the architect of the new law and business school building. He worked along with Professor Steele and Professor Roberts in doing most of the "hard dealing" with the building's architect. Determining the design, location and layout of the new professional center took up most of Dean Gaudio's time for six to eight months, although he has continually worked on the project since 1988. When the ground is cleared for the new building in August, 1990 and construction begins, Dean Gaudio's hard work will begin to come to life for Wake students and faculty.

Dean Gaudio's achievements at Wake Forest will remain long after he has gone to Wyoming, though his smile will be missed around Carswell Hall. We wish him well and know that he will enjoy the same success at the University of Wyoming that he has enjoyed here with the students and faculty of Wake Forest.

By Aim'ee N. Richardson, a first-year student from Ft. Myers, FL.

Ross Wins 1990 Zeliff Competition

A store was robbed. A woman lay dead from a gunshot wound. Her husband fired the fatal shot. The robber surrendered to police and another man, who was not at the scene of the crime, was being tried for murder.

Such was the case in this year's Zeliff competition in which second and third-year students argued both for the state and the defense. After three weeks of intense preliminary rounds, Joseph Ross, III, and David Wagoner entered the final round of the competition on March 2, and had the opportunity to display their talent in front of a courtroom packed with students. The Honorable Loretta Biggs presided over the competition and in the end declared Ross the winner.

Zeliff Winner Joseph Ross
(photo by Allen)

The annual Zeliff Trial Competition is sponsored by the Student Trial Bar. The Competition is named for Cynthia J. Zeliff, a 1973 WFU Law School graduate, who was killed several years ago in an accident.

Ross, a third-year student from Philadelphia, PA, received a $500 award for his efforts in the competition. Wagoner, a third-year student from Charlottesville, VA, received $250 as runner-up.

Speaker Challenges Law Students to Question the System

Duncan Kennedy, Professor of Law at Harvard Law School, delivered an emotional argument against the legal hierarcy before the Wake Forest School of Law on Thursday, January 18. The speech questioned American society in general and law students' orientation toward the possibilities of work in the legal profession in particular. Moreover, Kennedy stated that rights are not avenues of social justice between social classes, races or sexes.

During his brief stay in North Carolina, Kennedy also spoke at a Critical Legal Studies (CLS) symposium at the Duke University School of Law. CLS scholars are part of a "radical" legal intelligentsia who assess the legal system within a historical context. They believe the legal process has value judgments, preferences and policy positions. The nature of judicial or legislative pronouncements which establish a right for one particular person, group or institution, simultaneously imposes a restraint on those whose preferences impinge on the "legally" established right. The outcome is a legal process which acts as a method of social control.

Kennedy challenged the Law School student body to consider how everyone is both a participant and victim of injustice. Law students should attempt to recognize the inhumanity and immorality of the legal process. They should capitalize on their privileged roles and oppose the brutality of the legal system as it impacts disempowered victims. He noted that anyone whose existence was that of the perpetual underclass would exhibit their same self-destructive behavior.

Kennedy spoke of the fairness of reparations to Blacks, a concept which would repay black Americans wages for the forced free labor during over 350 years of slavery. A conservative estimate would provide payments to every black American in excess of $80,000. This concept has been applied recently in the United States when payments were made to descendants and living victims of the internment of Japanese-Americans during World War II. Additionally, Germany has made payments to victims of the Holocaust of World War II.

Kennedy also addressed sexual discrimination. He stated that society's custom and convention are blind to the substantive inequality of women at every level. He spoke to sexual harassment of women lawyers in the workplace and provided examples of subtle and blatant harassment of female attorneys at prestigious law firms and judicial clerkships.

Lastly, Professor Kennedy discussed class discrimination in the workplace. He criticized the management intensive supervision of most skilled and non-skilled occupations. Kennedy asserted that these environments foster a depravation of self-value.

Kennedy's speech was challenging and thought-provoking, yet it produced a critical reaction by many law students. Several students commented that Kennedy said nothing good about America and that there was "plenty of good in this country." Many students felt that Kennedy blamed white males for all the country's social ills. This, they felt, was an "unfair assessment and burden."

Whatever their reaction, Kennedy challenged students to question whether legal studies can be complete and honest without examining the brutality of the system in which they will work. Perhaps his intent was to discourage racial, sexual or class polarity. Perhaps he just wanted to heighten our consciousness, so that as future attorneys we will understand how the law has contributed to the perpetuation of villainy on millions of Americans.

By Titus Heagins, a first-year student.

Class Notes

1925

Albert A. Corbett was honored recently by a Resolution adopted by the Johnston County Bar Association. He practiced law or has been involved with the legal affairs of that county for the past 64 years.

1961

Ted B. Lockerman was elected vice-chairman of Sampson County Board of Commissioners in December, 1989. He has a general practice.

1963

Fred G. Morrison, Jr., administrative law judge, recently received a service award in appreciation of twenty years of state service. He also completed an evening course in "Christian Ethics" at Southeastern Baptist Theological Seminary.

1964

Leon Henderson, Jr., is a Superior Court Judge for the 7A District in Nash County, NC.

1965

Norman Kellum has been added to the board of directors of New West Bank of New Bern. New West Bank of New Bern (proposed) has filed an application with the North Carolina State Banking Commission requesting a banking charter.

1967

Wallace Bailey Watson is counsel in the legal department of Commercial Credit Corporation in Baltimore, MD. His responsibilities include drafting contracts for compliance with state and federal law, and monitoring litigation in selected states.

1969

Joe Dean, Secretary of the Department of Crime Control and Public Safety, recently received a 1990 Achievement Award from the North Carolina Victims Assistance Network. Secretary Dean was honored in the category of Outstanding Individual or Agency in Government. The NCVAN Achievement Award Program is designed to recognize those individuals and agencies in North Carolina who exemplify excellence in the pursuit of rights and services for crime victims.

1971

Adam C. Grant, Jr., is Chief District Court Judge for the 19A Judicial District. He was elected District Court Judge in 1974. In September, 1989, he was appointed Chief District Court Judge by James G. Exum, Jr., Chief Justice of the North Carolina Supreme Court.

1972

C. D. "Dick" Heidgerd concentrates in civil litigation at Ragsdale, Kirschbaum, Nanney, Sokol & Heidgerd in Raleigh, NC.

1976

Jay C. Hedgpeth, II, has joined Lawyers Title of North Carolina as a Vice President and counsel for the Winston-Salem office. Hedgpeth was formerly counsel for the Greensboro office of First Title Insurance Company. He resides in Winston-Salem.

1977

Kenneth H. Zezulka is vice president and general counsel at Talbert and Associates, Inc. His business consists of consulting engineering services for the refinery and petrochemical industry.

1978

Thomas W. Martin, Jr., celebrates the birth of daughter Elizabeth who was born on November 25, 1989. He also has a son, Alex.

Barbara DeMay Smith celebrates the birth of her daughter, Caroline, who was born on October 8, 1989, at Moses H. Cone Memorial Hospital in Greensboro, NC.

1979

Michael A. Colliflower is vice-president, general counsel and secretary of Lamar Life Insurance Company in Jackson, MS.

J. Randolph "Randy" Ward of the North Carolina Industrial Commission announced that he will be a Republican candidate for the North Carolina Court of Appeals. Governor Jim Martin appointed Ward to the Industrial Commission in February, 1989. Prior to his appointment, Ward practiced law for ten years in Durham with the firm of Nye, Mitchell, Jarviss & Bugg.

1980

Dan A. Boone is vice-president of finance at Food Lion, Inc., in Salisbury, NC. He was featured in *Business North Carolina* magazine in an article titled "The Right Stuff."

J. Anthony Penry has been elected partner with Petree Stockton & Robinson. Penry, who is based in the firm's Raleigh office, concentrates in construction, environmental and business litigation.

L. P. Fleming, Jr., has been promoted to vice president of the Branch Banking and Trust Company (BB&T) by the Board of Directors in Wilson, NC. He is married to the former Jane Bratton of Raleigh. They have one child.

1981

Charles L. Morgan, Jr., has relocated his law practice to Suite 110, Court Arcade Building, 725 East Trade Street, Charlotte, NC 28202.

Susan Surles is assistant public defender for Orange and Chatham Counties (15B) in Carrboro, NC.

James F. Wood, III, is on the 1989-1990 board of directors, and is vice president at Carolinas Carrousel, Inc. Also, he is a member of the "Make-A-Wish" Foundation of North Carolina.

1982

Douglas P. Arthurs and **Nancy E. Foltz,** have started a new law office, Arthurs & Folts, in Gastonia, NC. They are in the general practice of law.

Gary K. Joyner has been elected partner with Petree Stockton & Robinson. Joyner, who is based in the firm's Raleigh office, concentrates in commercial real estate transactions.

Thomas R. J. Newbern is an assistant district attorney in Murfreesboro, NC. He and his wife, Margaret, and his son, Thomas Miles, live in Aulander, NC.

1983

Kurt E. Lindquist, II, practices civil

litigation in Raleigh, NC. He is a partner with the firm LeBoeuf, Lamb, Leiby & MacRae. He and his wife, Katherine, and their two sons live in Raleigh.

Robert L. Outten has been named to the nine-member Dare County advisory board of First Union National Bank of North Carolina. He and his wife, Connie, have four children and are members of Kitty Hawk United Methodist Church, where he is chairman of the Council on Ministries.

Margaret E. Shea has been named partner in the Greensboro law firm of Adams, Kleemeier, Hagan, Hannah & Fouts. She specializes in real property law and civil litigation. She joined the law firm in December, 1983. She is the former president of the Young Lawyers Division of the Greensboro Bar Association.

1984

Craig T. Eliassen was named partner at Schmittinger & Rodriquez in Dover, Delaware. He concentrates in civil litigation. He is director of the Lower Delaware Gridiron Club.

Craig B. Wheaton and **Sarah Wesley Foy** announce the birth of their second child, Sarah Wesley Wheaton, who was born on December 27, 1989.

Deborah (Helms) Alston is with the law firm Young, Clement, Rovers & Tisdale. She has a general practice with an emphasis on litigation.

Walter C. Holton practices criminal and civil litigation with his partner Lisa V. L. Menefee. Holton was elected chairman of the Forsyth County Democratic Party.

Brian M. Nugent practices commercial litigation and sports law in Tallahassee, FL. He is with the law firm of Pennington, Wilkinson, Dunlap and Camp.

J. Kemp Sherron, III, has become a partner with Wyrick, Robbins, Yates & Ponton in Raleigh, NC. Sherron's practice concentrates in real estate and banking law. He and his wife, Mary celebrated the birth of their second son, Harrison Neal, who was born on November 6, 1989.

Donna L. Savage (formerly Donna L. Parker) was married on June 25, 1989, to J. David Savage of Charlotte, NC.

Terry M. Taylor has been named partner in the law firm of Tate, Young, Morphis, Bach and Farthing.

1985

Mary Wilson, associate general counsel at Hoechst Celanese Fibers and Film Group, was named by Ebony magazine as one of the 100 "best and brightest Black women in corporate America." She serves as the corporate liason for the Mecklenburg County Continuing Legal Education Committee of the Bar Association, and is statewide officer of the American Corporate Council Association.

1986

Mark C. Holloway has joined Booke & Company as technical consultant specializing in group benefits and flexible benefit plans. He will work in Booke's Winston-Salem office.

Teresa Clemmons Nugent is in-house counsel for the Association of Voluntary Hospitals of Florida, in Tallahassee, FL. She concentrates in health care law and lobbying for the hospital association.

1987

Dennis Nicewander is an assistant state attorney in Broward County. He is lead prosecutor in the Felony Trial Division.

1988

Amy Angert is with the law firm of Fisher, Rushmer, Werrenrath, Keiner, Wack, Dickson in Maitlan, FL. She practices in the areas of insurance defense/malpractice litigation. She is on the legislative committee for the Orange County Medical Society. Recently, she celebrated her second child's first birthday.

Pam A. O'Brien (formerly Pamela O'Brien Dannals) is working as an associate at Hollowell & Silverstein in Raleigh, NC. She practices in the areas of health care law and administrative law.

Mary Beth Swecker, associate attorney, has joined the law firm of Nichols, Caffrey, Hill, Evans, & Murrelle in Greensboro, NC. She was formerly with the law firm of Ivey, Ivey & Donahue in Greensboro.

WHAT'S NEW? *Wake Forest Jurist* would like to hear from all alumni about any new developments in your life. Kindly take a few moments to fill out the form below and return it to *Wake Forest Jurist*, Wake Forest University School of Law, P. O. Box 7206, Winston-Salem, NC 27109-7206.

Name: _____ Year of Law School Graduation: _____

Business Address: ☐ (check if new address) _____

_____

Home Address: ☐ (check if new address) _____

_____

Brief description of law practice or business:

_____

Public offices, professional, and civic honors with dates: _____

_____

Personal items of current interest: (i.e. marriage, birth of child) _____

_____

_____

Candidates for the Juris Doctor Degree
May, 1990

Alvarez Lopez Abernathy	Charlotte, NC
George Bryan Adams, III	Charlotte, NC
Kurt Robert Allen	Boardman, OH
Philip S. Andrews	Trenton, NJ
Joseph D. Anthony, III	Lilburn, GA
Michael Andrew Avram	Winston-Salem, NC
James Robert Ayers	Lenoir, NC
Lawrence Michael Baker	Lansing, MI
Linda Williams Bakhit	Charleston, SC
Betty Pincus Balcomb	High Point, NC
Allison Rosser Barnhill	Charlotte, NC
Stephen Drew Barnhill	Winston-Salem, NC
Leonard H. Bennett	Huntsville, AL
Susannah Marie Bennett	Warsaw, NC
Jonathan Walter Biggs	Durham, NC
§Charles Winfred Billingsley, Jr.	Signal Mountain, TN
Robert Sidney Blair, Jr.	Charlotte, NC
Walter Woodard Blake, Jr.	Wilson, NC
Cindy Gay Brewer	Lake, MI
Robert C. Broderick, Jr.	Lancaster, PA
Lyn K. Broom	Easley, SC
Anne Johnson Brown	Raleigh, NC
Brian A. Buchanan	Spruce Pine, NC
Forrest Wilson Campbell, Jr.	Winston-Salem, NC
Kenneth Paul Carlson, Jr.	Winston-Salem, NC
Mark Lowe Childers	Mooresville, NC
§Katrina Elaine Chisolm	Jasper, AL
Brenda Alison Barnes Clark	Chattanooga, TN
Leonard M. Cohen	Cornelia, GA
Donna Marie Colberg	Parkersburg, WV
Charles Wayne Coltrane	High Point, NC
Thomas A. Coulter	Harrisonburg, VA
Barbara Lloyd Curry	Lynchburg, VA
Susan Elaine Curtis	Charlotte, NC
Dana Hefter Davis	Cary, NC
Michelle Diane Davis	Cary, NC
Joseph B. Dempster, Jr.	Winston-Salem, NC
Emily Susan Dolan	Lakeland, FL
Catherine L. Dubay	Saginaw, MI
Robert Oren Eades	Long Island, NC
Mark Christopher Filburn	Dayton, OH
John Edward Fitzgerald	East Lansing, MI
Patrick Houghton Flanagan	Washington, DC
James David Flowers	Goose Creek, SC
John Michael Flynn	Winston-Salem, NC
Karen VeAnn Friesen	Wasilla, AK
§Larry Lee Garber, Jr.	Kingsport, TN
Ann Gardner	Roanoke, VA
Gaylynn Gee	Dallas, TX
Nils E. Gerber	Syracuse, NY
Granice Louise Geyer	Fort Lauderdale, FL
Linda Shea Gieseler	Gahanna, OH
Mark E. Gleason	Waterloo, NY
Victoria Freedman Goldstein	Winston-Salem, NC
Kristen Elise Gore	Cincinnati, OH
Anthony Conley Griffin	Charlotte, NC
Leah Quentin Griffin	Raleigh, NC
David Lee Hall	Winston-Salem, NC
§John Hardy Hall, Jr.	Raleigh, NC
Joseph Clement Hearne, II	Wilmington, NC
Mary Nolan Hedrick	Fayetteville, NC
Pamela Jeanne Hendricks	Erie, PA
John William Hester	Norfolk, VA
John Paul Higgins	El Dorado, AK
Ashley Lee Hogewood, III	Charlotte, NC
Margaraet Anne Holthusen	Winston-Salem, NC
Marc Walter Ingersoll	Winston-Salem, NC
Amy Beth Jackson	Petoskey, MI
Stephen Jay Jobe	Fairfax, VA
David Wayne Johnson, Jr.	Agoura Hills, CA
Douglas F. Kaleita	West Palm Beach, FL
John Paul Kapp	Galax, VA
Terry M. Kilbride	Avon Lake, OH
Carrie Morris Koontz	Winston-Salem, NC
Andrew Thomas Landauer	Grosse Pointe, MI
Edward Keen Lassiter	Dunn, NC
Joel M. Leander	Winston-Salem, NC
Dennis Howard Lee	Richlands, VA
§Mary B. Levenson	Oxford, NC
Marcy Denise Louza	Greensboro, NC
James Frederick Lovett, Jr.	Raleigh, NC
Sandra Lynn MacQuarrie	Inverness, FL
Lisa Gay Maness	Polkton, NC
Jennifer Anne Martin	Baltimore, MD
Charles Floyd McDarris	Waynesville, NC
Bernard Aloysius McDonough	Emmaus, PA
Nancy Johnston McFarlane	Charlottesville, VA
Donna Sue McLamb	Dunn, NC
John Fitzgerald McLemore	Richmond, VA
Scott P. Mebane	Asheville, NC
Douglas John Meis	Winston-Salem, NC
James Michael Mills	New Bern, NC
Allison Marie Moore	High Point, NC
Jeanelle Medlin Moseley	Raleigh, NC
Beverly Susan Murphy	Winston-Salem, NC
Andrew Joseph Murray	Wilmington, DE
Christine Therese Nero	Strongsville, OH
Anne Fuller Nicholson	Murfreesboro, NC
Stephen Joseph O'Brien	Pittsburgh, PA
James Michael Patterson	Chatham, MA
Keith Pendleton	Bryn Athyn, PA
Jeffrey King Peraldo	Greensboro, NC
Rodney Earl Pettey	Wake Forest, NC
Mark W. Phillips	Virginia Beach, VA
Catherine Ann Potter	Charlotte, NC
Robert Daniel Potter, Jr.	Charlotte, NC
Alan Brandau Powell	Shallotte, NC
Kimberly Gaye Powell	Raleigh, NC
Lynn Louise Puchalski	Dover, NJ
Kara Elizabeth Quadland	Winston-Salem, NC
Reed William Ramsey	Des Moines, IA
Michael Joseph Randall	St. Petersburg, FL
John Gregory Rhyne	Carlisle, PA
Keith W. Rigsbee	Morganton, NC
Henry Conrad Roemer, III	Winston-Salem, NC
Joseph Lanny Ross, II	Philadelphia, PA
Michael H. Sartip	Cheraw, SC
Anne Marie Shaw	Edmore, MI

Valerie Marie Siciliano	Ossining, NY
Robert Gordon Spaugh	Winston-Salem, NC
Anne Victoria Sprague	Patrick Springs, VA
Gwendolyn L. Sprigle	Williamsburg, VA
Ina Lee Stanton	Tampa, FL
Luther Donald Starling, Jr.	Clinton, NC
Todd A. Stewart	Buckhannon, WV
Brien D. Stockman	Kirwin, KS
Douglas Michael Strout	Guilderland, NY
Michael Sykos	Granite Quarry, NC
Adelia Rives Ellis Taylor	Greenville, NC
Mark Anderson Taylor	Roaring Gap, NC
Mary Katherine Line Thompson	Charlotte, NC
Sara Anne Tuffli	Grand Rapids, MI
Thomas Scott Tufts	Ft. Lauderdale, FL
Allyn Gudheim Turner	Blacksburg, VA
David Carroll Wagoner	Charlottesville, NC
Richard A. Watts	Shreveport, LA
§Sylvester Emmanuel Williams, IV	Raleigh, NC
Mary Tamille Williamson	Lumberton, NC
§Nancy Caroline Willis	Jacksonville, NC
Carolyn Elizabeth Wilson	Durham, NC
Patrick Noel Woodie	Piney Creek, NC
John David Young, Jr.	Charleston, WV
Christine Elizabeth Zuehlke	Crystal Lake, IL

Conferred December 19, 1989

Frances Hale Barrow	New Albany, IN
Sheri Lynne Kathleen Clanon	Media, PA
Frances Elizabeth Clement	Durham, NC
Lawrence J. Gillen	Chicago, IL
Daniel O'Connor Kennedy	Owosso, MI
Thomas Alan Schmidt	Bloomington, MN
Velma J. Simmons	Winston-Salem, NC

§ Joint degree Juris Doctor/Master of Business Administration

Oath

Oath taken by the Candidates for the Juris Doctor Degree at the Wake Forest University School of Law Hooding Ceremony.

I DO SOLEMNLY SWEAR THAT UPON BEING DULY LICENSED TO PRACTICE THE PROFESSION OF LAW:

I will support the Constitution of the United States;

I will maintain the respect due to Courts of Justice and judicial officers;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will not seek to mislead the Judge or jury by any artifice or false statement;

I will maintain the confidences of my client, and will accept no compensation in connection with the transaction except with the client's approval;

I will advance no fact harmful to the honor or reputation of a party or witness, unless required by the justice of the cause which I am charged;

I will not reject for personal reasons, the cause of the defenseless or oppressed, or delay any person's cause for personal gain or malice, SO HELP ME GOD.

Wake Forest University School of Law
1990 Legal Education Schedule

Family Law Equitable Distribution

August 2	Raleigh (Live)	Raleigh Marriott Hotel
August 9	Winston-Salem, (Video)	North Holiday Inn
August 23	Charlotte (Video)	Adam's Mark Hotel
August 30	Asheville (Video)	Grove Park Inn

6.25 MCLE hours including 5.0 Practical Skills, 1 Ethics

Family Law Support Litigation

August 3	Raleigh (Live)	Raleigh Marriott Hotel
August 10	Winston-Salem, (Video)	North Holiday Inn
August 24	Charlotte (Video)	Adam's Mark Hotel
August 31	Asheville (Video)	Grove Park Inn

6.25 MCLE hours including 5.0 Practical Skills, 1 Ethics

Real Property/Residential — 1990

Sept. 6	Raleigh (Live)	Brownestone Hotel
Oct. 4	Winston-Salem (Video)	Clemmons Holiday Inn
Nov. 1	Charlotte (Video)	Adam's Mark Hotel
Nov. 28	Asheville (Video)	Grove Park Inn

6.5 MCLE hours including 5 Practical Skills, 1 Ethics

Real Property/Commercial — 1990

Sept. 7	Raleigh (Live)	Brownestone Hotel
Oct. 5	Winston-Salem (Video)	Clemmons Holiday Inn
Nov. 2	Charlotte (Video)	Adam's Mark Hotel
Nov. 29	Asheville (Video)	Grove Park Inn

6.5 MCLE hours including 5 Practical Skills, 1 Ethics

Annual Review

Sept. 28-29	Raleigh (Live)	McKimmon Center
Oct. 19-20	Asheville (Live)	Grove Park Inn
Oct. 26-27	Charlotte (Live)	Woodlawn Holiday Inn
Nov. 16-17	Winston-Salem (Live)	Benton Conv. Center

12 MCLE hours including 2 Ethics

General Practice

Oct. 11-12	Raleigh (Live)	Brownestone Hotel
Nov. 8-9	Winston-Salem, (Video)	North Holiday Inn
Dec. 6-7	Charlotte (Video)	Adam's Mark Hotel
Dec. 13-14	Asheville (Video)	Grove Park Inn

12 MCLE hours including 10 Practical Skills, 2 Ethics

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